Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Developing a Unified Intercarrier Compensation Regime	)	CC Docket No. 01-92
	)	

COMMENTS OF CAVALIER TELEPHONE, LLC MCLEODUSA TELECOMMUNICATIONS SERVICES, INC. NORLIGHT TELECOMMUNICATIONS, INC. PAC-WEST TELECOMM, INC. RCN CORPORATION

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SUMMARY

The heart of the Plan is preservation of current ILEC revenues in the face of 1) line loss to competition, 2) continuing reductions in ILEC access volumes and 3) reduced rates associated with its proposed intercarrier compensation “reform.” The Plan, offers only bogus justifications for what is in fact an anticompetitive ILEC objective.

The consumer benefits alleged in Clark/Makarewicz Study also do not justify the Plan’s proposed new subsidy to ILECs. The Clark/Markarewicz study is based on flawed assumptions in a number of respects and also ignores new ILEC revenue opportunities. Based on appropriate assumptions, the Plan constitutes a very large net loss to consumers and the U.S. economy as a whole, while providing ILECs a windfall. Nor is the cost to consumers of funding the Plan and the Restructure Mechanism justified by universal service benefits because the Plan makes absolutely no claim that it is related to or promotes universal service. Simply put, the ILEC goal of preservation of current ILEC revenues is completely unjustified as a part of intercarrier compensation reform.

The Plan actually threatens universal service goals and programs because it would impose massive new costs - a 32% increase -- on the same contribution base. Unless the laws of economics have been suspended by the Plan’s proponents, such a cost increase will depress demand for service with the reduction likely to affect the very income groups that are the intended beneficiaries of universal service. Given the unstable basis of current universal service funding, it would be very imprudent for the Commission to impose the costs of the Plan on the universal service contribution base even it were to establish a new contribution methodology.

The Plan’s justification, that a new subsidy mechanism is necessary and desirable to promote investment in broadband is contrary to the Commission’s own finding. The

Commission has already determined that potential broadband revenues are a sufficient incentive for both ILECs and CLECs. Rather than subsidies, the best incentive for ILEC broadband investment is current line loss which has and will continue to incent ILECs to invest to retain and gain new customers.

The Plan's Christmas tree approach attaches "fixes" for issues unrelated to intercarrier compensation reform by proposing a host of new interconnection rules and obligations. These are irrelevant and unnecessary to the intercarrier compensation rate "reform" proposed in the Plan. The impact of the Plan's interconnection proposals is to shift the ILECs' share of the cost of interconnection from ILECs and impose those costs on other interconnecting carriers. The interconnection scheme is an additional technique in which the ILECs seek to offset expected declines in their revenues. There is no need for the Commission to make any such complicated and costly changes in order to implement intercarrier compensation reform. The Plan would unnecessarily disrupt myriad existing arrangements to the benefit of ILECs and detriment of other interconnecting carriers.

In fact, the Plan would not achieve any of the goals of intercarrier compensation reform that the Commission has identified in this proceeding. It would not achieve a competitively neutral program of intercarrier compensation reform because, as noted, it is based on the inherently anticompetitive premise that ILECs are entitled to large new subsidy programs, paid for in part by interconnecting carriers' customers, designed to insulate ILECs from competition. The proposed revenue recovery through increased SLCs also favors ILECs because under "pricing flexibility" rules they will be able to target SLC increases to noncompetitive areas and customer segments. Numerous other aspects of the Plan are harmful to competition, including the proposed unnecessary new interconnection arrangements which would impose significant costs on non-ILEC interconnecting carriers.

The Plan would not achieve the goal of uniformity or simplicity of intercarrier compensation regulation. While others have proposed a straightforward uniform rate system across carriers and across all types of traffic, the Plan is a complicated, cumbersome, and arbitrary mixed bag of differing rates and voluntary and mandatory features. Both regulators and carriers will incur significant costs to administer and comply with these complex and burdensome requirements. For this reason, the Plan will create new, rather than eliminate, regulatory arbitrage opportunities.

Nor would the Plan achieve other intercarrier compensation goals. It would not promote efficient investment by ILECs because they will be subsidized, nor by CLECs because they would be subject to below cost rate caps. The Plan would not create regulatory certainty because, as explained in these Comments, the Plan is unclear in important respects and has numerous unlawful aspects which will inevitably result in years of litigation.

The Plan would not achieve the Commission's apparent goal of achieving intercarrier compensation through industry consensus. Competitive carriers, cable operators, wireless carriers, consumer groups, and even Verizon oppose the Plan. Not even NARUC, after significant effort on its part, has endorsed the Plan. Therefore, there is no possible justification for adoption of the Plan based on industry consensus.

The changes to intercarrier compensation proposed by the Plan do not achieve genuine intercarrier compensation reform. At the same time, the Plan includes numerous anticompetitive pro-ILEC provisions. Accordingly, the Commission should reject the Plan in its entirety.

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PAC-WEST TELECOMM, INC.
RCN CORPORATION

Cavalier Telephone, LLC, McLeodUSA Telecommunications Services, Inc., Pac-West Telecomm, Inc., Norlight Telecommunications, Inc., and RCN Corporation submit these comments in opposition to the "Missoula Plan" filed on July 24, 2006 by the National Association of Regulatory Utility Commissioners' Task Force on Intercarrier Compensation.[1]

I. THE MISSOULA PLAN IS INCONSISTENT WITH FCC GOALS

In the *NPRM* initiating this proceeding,[2] the Commission announced and sought comment on its goals for intercarrier compensation reform: competitive neutrality,[3] the "larger

1 Comment Sought on Missoula Intercarrier Compensation Reform Plan, *Public Notice*, CC Docket No. 01-92, DA 06-150 (rel. July 25, 2006).

2 Developing a Unified Intercarrier Compensation Regime, *Notice of Proposed Rulemaking*, CC Docket No. 01-92, FCC 01-132, (rel. April 27, 2001) ("*NPRM*").

3 *NPRM* at ¶ 4.

goal" of a unified regulatory regime,[4] economic efficiency,[5] minimizing the need for regulatory intervention,[6] encouraging investment, and technology neutrality.

While the Commission can, and should, fashion intercarrier compensation that comports with these goals, and that otherwise complies with the Communications Act, the Plan absolutely does not do so. The Plan is not competitively neutral. The Plan is premised on the anticompetitive assumption that ILECs are entitled to new subsidy programs to make up for loss of lines and minutes-of-use (MOUs"), as well as for reductions in revenues caused by intercarrier compensation reform. Commission policy should be directed at encouraging competition and marketplace forces, not protecting ILECs from both. Even if there were justification for new subsidy programs, there is no plan for participation in the Restructure Mechanism by competitive carriers. In addition, among other reasons, the Plan is not competitively neutral because it would favor ILECs in their ability to target increased SLCs to noncompetitive areas and customer segments; and because the proposed network interconnection rules would impose costly network changes only on non-ILEC competitors and thus relieve the ILECs of much of their current interconnection obligations.

Fundamentally, the Plan would not achieve the basic goal of a unified regulatory framework governing intercarrier compensation. Far from uniformity, the Plan would establish a senseless quilt of compulsory and voluntary components, different approaches for interstate and intrastate intercarrier compensation, as well as arbitrary requirements based on new, unjustified categories of carriers. The Plan contemplates different rates for origination and termination of

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4 *NPRM* at ¶¶ 4, 36, 90, 97.

5 *NPRM* at ¶ 4.

6 *NPRM* at ¶ 3.

traffic. Separate rates would be established for ISP-bound traffic. New disparities would be introduced for compensation for 8YY traffic previously covered under access rates. Thus, far from creating a simplified regime of the same rates for the same functions, the Plan would perpetuate arbitrary or ILEC-benefiting regulatory distinctions.

Nor would the Plan achieve any of the Commission's other goals. Shifting ILEC revenue recovery to new subsidy programs would discourage efficient investment by ILECs because their investments would be subsidized. A point regularly made by the ILECs when they opposed alleged arbitrage by competitors. The Plan also would actively discourage efficient investment by unsubsidized carriers because it would impose below-cost rate caps.

The Plan would not reduce the need for regulatory intervention because it creates new opportunities for regulatory arbitrage. Similarly, the new proposed interconnection arrangements would lead to numerous disputes between carriers requiring resolution by regulators or courts. At the same time, the Plan is so complex that it is inscrutable. As such, it will be nearly impossible to administer for regulators and carriers. It will require vast new regulatory subsidies and support mechanisms. It will embroil the industry in years of litigation and further change. Nothing could be less likely to achieve simplicity in regulation, or obviate the need for regulatory intervention than the Plan.

The Plan would substantially increase regulatory <u>un</u>certainty for every participant except the ILECs. As discussed in these comments, the Plan is unclear in a number of important respects. The substantial questions of lawfulness of various aspects of the Plan, such as preemption of state authority over intrastate communications, imposition of below-cost rates, prescription of rate caps based on negotiations by some parties, and establishment of ILEC support programs unrelated to universal service, guarantee years of litigation and uncertainty. In addition, the Plan itself envisions further major proceedings to address intercarrier compensation,[7] virtually an admission that it makes little progress toward genuine, stable intercarrier compensation reform.

Nor would the Plan achieve the Commission's apparent goal of achieving intercarrier compensation reform through industry consensus. Simply stated, there is no industry consensus -- CLECs, wireless carriers, cable operators, consumer groups, Qwest and Verizon have publicly stated that they oppose the Plan.

In light of the Plan's disregard of Commission goals, it is not surprising that it is devoid of any supported claims that it would promote such goals. The Commission should reject the Plan because it is inconsistent with and works against the Commission's goals for intercarrier compensation reform.

II. ILEC REVENUE PRESERVATION IS NOT A NECESSARY NOR DESIRABLE FEATURE OF INTERCARRIER COMPENSATION REFORM

The fundamental premise of the Plan is that preservation of ILEC revenues should be a goal of intercarrier compensation reform. The Plan would accomplish this goal primarily through the Restructure Mechanism which, through a complex formula, would permit ILECs to recover revenues lost by reduced intercarrier compensation payments to the extent they are not recovered in increased SLCs. The Plan also would calculate ILEC payments from the

[7] The Missoula Plan for Intercarrier Compensation Reform ("*Plan*"), Executive Summary, p. 2 (July 18, 2006).

Restructure Mechanism "assuming no change in MOU demand,"[8] even though according to the FCC, access MOUs have been declining each year for at least the last 10 years.[9]

The Plan's primary result is ILEC revenue preservation. Not even the Plan's proponents claim that as a goal of intercarrier compensation reform. Instead, they offer two theories to support this aspect of the Plan. Neither has any merit. First, as discussed in the next section of these comments, the Plan claims that it will promote broadband investment by protecting ILECs from reducing revenue due to lines lost to competition. But this does not justify massive new ILEC revenue replacement programs because, among other reasons, the Commission already has determined that revenue opportunities from broadband investment provide a sufficient investment incentive for both CLECs and ILECs.

Second, the Clark/Makarewicz-study claims that the Plan would produce a significant net benefit to consumers. As described elsewhere in these comments, this study is based on flawed assumptions, including that access MOUs will increase. But even if its assumptions were correct, the Clark/Makarewicz Study ignores the depressive impact of additional revenue extracted from customers. The study ignores the obvious fact that consumers would be better off if they were not required to fund the Restructure Mechanism and other subsidies that would increase the cost of "universal service" by 32%. Accordingly, the Clark/Makarewicz study does not justify new programs to subsidize ILEC revenues.

It might have been useful for the Plan's proponents to attempt to justify ILEC revenue replacement programs under Section 254 and universal service goals. But the Plan makes no

8 *Plan* at §VI.A.1.b.iv.b(i), p.66.

9 *Trends in Telephone Service*, Industry Analysis and Technology Division Wireline Competition Bureau, Tables 10-1, 10-2 (June 21, 2005).

claims that the Restructure Mechanism is based on section 254 goals. Indeed, as explained elsewhere in these comments, the Commission already has determined that implicit subsidies have been removed from interstate access charges. To the extent that ILEC access charges are above cost, the benefit of maintaining those revenues flows to the ILECs, not to universal service. Accordingly, there is no universal service basis for adoption of the Plan's ILEC revenue preservation program.

It would also be inconsistent with, and distort, marketplace forces for the Commission to establish new programs designed to preserve ILEC revenues. The Plan does not address, much less attempt to justify, why consumers should subsidize ILECs based on current volumes when marketplace forces are causing declines in access lines, MOUs, and access revenues. In fact, since market forces are causing a decline in access revenues, it is unclear why it is necessary at all to shift any level of ILEC access charges to subsidy support. It would be most consistent with the Commission's market-based "regulation" policy to permit continued declines in access revenues. Preservation of ILEC revenues conflicts with, and would thwart, the Commission's key goal of market forces of driving access charges to cost.[10] At the same time, insulating ILEC revenues from competitive forces would seriously distort the marketplace, making ILECs subsidized, inefficient competitors while concurrently precluding efficient cost-based investment by CLECs and other carriers by virtue, in part, of the ILEC subsidization.

The ILEC revenue preservation aspect of the Plan reveals that the Plan's proponents' primary goal of intercarrier compensation "reform" is adoption of a government program that will preserve ILEC revenues in the face of marketplace trends. ILECs that support the Plan want

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[10] *Access Charge Reform*, First Report and Order, CC Docket No. 96-262, FCC 97-158, ¶ 44 (rel. May 16, 1997) (*Access Reform Order*).

special protection from the impacts of a competitive marketplace, rather than compete in that market. The Commission should reject this and other aspects of the Plan that attempt to shield these ILECs from competitive pressures. It would be the worst possible result for government-sponsored programs to subsidize these ILECs and protect them from competition, thereby eliminating any incentive for them to upgrade their outmoded networks and services in non-urban markets. This would distort the marketplace, discourage innovation and competitive entry, and overburden consumers.

Accordingly, there is no basis for including ILEC revenue preservation in this or any plan for access reform.

III. THE MISSOULA PLAN WILL NOT PROMOTE EFFICIENT BROADBAND INVESTMENT

The Plan claims that it will "reform *yesterday's* regulation, designed for the legacy narrowband world, to accommodate *today's* intermodal, competitive, and increasingly Internet-oriented communications environment."[11] The Plan states that it will promote the goal of broadband investment because ILECs have been losing minutes and that by shifting ILEC recovery away from intercarrier compensation charges toward increased SLCs and new subsidy programs, ILECs will be better able to invest in broadband.[12]

This claim is unpersuasive. In the *Triennial Review* proceedings the Commission eliminated section 251(c)(3) unbundling obligations for ILECs' new broadband investments in order to assure that ILECs could respond adequately to marketplace forces for new broadband

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11 *Plan*, Legal and Policy Overview, p. 1.

12 *Plan*, Legal and Policy and Legal Overview, p. 1-2.

services and investment.[13] The Commission determined that CLECs face comparable burdens, risks, and opportunities for new broadband revenues as do ILECs, thereby eliminating any need for unbundling obligations for FTTH, FTTC, and predominantly residential MDUs.[14] But, if CLECs are unimpaired in making new broadband investments because of new revenue opportunities, then, at the very least, it is equally the case that ILECs do not need massive new subsidy programs in order to invest in broadband, especially given the ILEC's inherent advantages over competitive carriers in terms of access to rights of way. The marketplace revenue opportunities for broadband are sufficient incentive for ILECs to invest. If Verizon can invest $18 B in FTTH under current rules, there is no basis to conclude that those rules need to be changed to promote broadband investment. Indeed, subsidizing ILECs will create exactly the opposite result. By providing revenue assurance for legacy services and networks in the form of a subsidy, the BOCs will have less incentive to invest in new networks since such subsidization (a) protects ILECs from competition by discouraging investment by competitors in their markets and (b) discourages RBOCs from investing in new networks to provide advance services. Indeed, declining revenues for legacy services provide the best incentive for ILECs to invest in broadband because it incents them to invest to obtain new revenue sources. In light of the unbundling relief already provided to ILECs, it is gross overreaching on their part to ask for massive new subsidy programs in order to invest in broadband.

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13 *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98, 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978 (2003) ("*Triennial Review Order*" or "*TRO*"), corrected by Errata, 18 FCC Rcd 19020 (2003).

14 *Triennial Review Order* at ¶ 275.

The Commission recently changed the regulatory scheme for the ILECs' provision of broadband service from Title II of the Act to Title I, in part on the proposition that "all potential investors in broadband network platforms, and not just a particular group of investors, are able to make market-based, rather than regulatory-driven, investment and deployment decisions."[15] Such a claim has been a keystone in recent ILEC advocacy. The Plan turns such logic on its head by now claiming that ILECs need subsidies to make such investments, while other carriers do not.

Moreover, the Plan fails to explain why merely maintaining current revenues would increase any incentives to invest in broadband. Since current revenue streams apparently are not adequate to encourage broadband investment touted by the Plan sponsors, it begs the question why the same revenue stream would increase their broadband investment merely because the source of the revenues are shifted from intercarrier compensation to subsidy programs. Clearly, as the Commission has determined, the market provides the best incentive for encouraging broadband investment, not creating artificial cross subsidies that impede competition.

Assuming the Commission wanted to subsidize broadband investment, it would need to do so pursuant to Section 254 of the Act, which requires that any support be sufficient (by implication, no more than sufficient) and explicit. But, as discussed elsewhere in these comments, the Plan makes absolutely no claims that it would promote universal service or that the new subsidy mechanisms proposed by the Plan comply with the requirements of Section 254. Of course, until the Commission establishes the standards and goals for broadband universal service, the Plan's proponents cannot claim that the increased subsidies in the Plan actually

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15 *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, CC Docket Nos. 02-33 et al., Report and Order and Notice of Proposed Rulemaking, FCC 05-150, ¶ 45 (rel. Sept. 23, 2005) ("*Wireline Broadband Order*").

promote universal service by subsidizing ILEC investment or are sufficient or necessary for that purpose. And absent a requirement in the Plan that the subsidies be used for such purposes, there can be no assurance that the subsidy funds actually would be used to promote broadband universal service instead of ILEC profits.

Accordingly, the Commission should not, and may not, adopt the Plan under the false premise that it would promote broadband investment.

IV. THE MISSOULA PLAN IS NOT COMPETITIVELY NEUTRAL

A. The Restructure Mechanism Favors ILECs

The aspect of the Plan that most egregiously favors ILECs is the implicit assumption that access reform must be accompanied by subsidy programs designed to assure that current levels of ILEC revenues are preserved. As already discussed, there is no policy basis for intercarrier compensation reform to be accompanied by, or focus on, ILEC revenue preservation. Consumers would be better off if they were not required to fund the Restructure Mechanism. Even if there were some policy basis for the Restructure Mechanism, it is not competitively neutral. For example, assuming that the Plan would promote ILEC broadband investment, which as discussed above it will not, why should customers of other carriers, by means of ILEC revenue preservation, be required to fund that investment? Cable companies have made significant investment in broadband without a subsidy program of such magnitude. Similarly, why should other carriers' customers be required to maintain ILEC access revenues at current levels even though it is most likely the case that access minutes will continue to decline? More broadly, why should other carriers' customers be required to make up the difference in ILEC revenue losses caused by losses in lines and MOUs to other carriers? The answer is that there is absolutely no basis for non-ILECs or their customers to be required to make ILECs whole from competitive losses.

With respect to non-ILEC carriers, the Plan states only that "Restructure Mechanism dollars will be available to other carriers in circumstances to be determined in the future."[16] Thus, on its face the Plan envisions a government-sponsored subsidy for all ILECs, leaving it completely open whether other carriers should or could participate in any such programs. Notably, the Plan contains no explanation or justification as to why the Restructure Mechanism is limited to ILECs.

Although there is no basis for <u>any</u> carrier to be made whole via a Restructure Mechanism as envisioned in the Plan, the Commission should reject the Plan because of the anticompetitive nature of he Restructure Mechanism rules. The proposed Restructure Mechanism is nothing more than an attempt by ILECs to preserve revenues at the expense of consumers and competitors, and thus, must be rejected.

B. The Proposed SLC Recovery Favors ILECs and Harms Competitors

The proposed SLC recovery also favors ILECs and disfavors consumers and competition. By and large, most CLECs serve business, not residential customers in urban markets. ILECs face less competition in the residential market for comparable services, even where there is one cable competitor, rather than multiple competitors. ILECs would, therefore, be better able than CLECs to recover revenues because they can shift recovery to selected residential customers and business customers in less competitive markets with a lesser risk of the customer moving to a competitor. Most CLECs, on the other hand, only would be able to attempt recovery from

[16] *Plan* at §VI.A.2.a., p. 74.

business customers. Since business markets are more competitive, CLECs' customers would be more likely to switch to another carrier or back to the ILEC. Therefore, the SLC recovery mechanism would favor ILECs by insulating ILEC cost recovery from competitive market forces. It is no accident, therefore, that the Plan would load most SLC increases on residential customers. For example, for Track 1, residential SLCs could increase from $7.25 to $10.00, whereas the multiline business SLC could increase from $9.20 to $10.00.[17]

Apart from the fact that the SLC recovery mechanism favors ILECs by building on their greater participation in the residential markets, the proposed SLC "pricing flexibility" rules also favor ILECs. "Pricing flexibility" rules would permit geographical deaveraging of SLCs. SLC prices could vary for up to four pricing zones per state.[18] At Step 4, constraints on pricing zones would be eliminated.[19] There would be no formula for the initialization of the SLC rate in each pricing zone.[20] The Plan also permits ILECs to "apply different SLC charges based on customer segment."[21] Customer segment may be based on customer class, pricing zone, or purchase choice, including but not limited to, volume purchase, term commitment, and/or growth commitments.[22] Prices for SLCs also could vary based on customer choice including volume purchase, term commitment, and/or growth commitments.[23]

It is clear that ILECs have varying degrees of substantial market power in different geographic areas, customer segments and service segments. There is an inverse relationship

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17 *Plan* at II.C.1., p. 20.

18 *Plan* at §II.C.7.a.i., p. 24.

19 *Plan* at §II.C.7.b.i., p. 25.

20 *Id*.

21 *Plan* at §II.C.7.a.iii., p. 24.

22 *Id*.

23 *Plan* at §II.C.7.a.ii., p. 24.

between the degree of market power and the extent of competition. The pricing flexibility built into the Plan by the ILEC proponents works to the competitive advantage of those ILECs. The ILECs would be able to raise SLCs where there is relatively little competition, and leave rates low where competitors are applying pressure to the ILECs.

The Commission closely regulates SLCs, which are access services, because ILECs possess market power in the provision of access services.[24] The Commission has not found that ILECs are nondominant in the provision of access services.[25] ILECs have the incentive and ability to overcharge end-user customers in a non-trivial manner. Even if it were the case that some local market customer segments or geographic areas are competitive, others are not. Therefore, the "pricing flexibility" rules are no more than a recipe for ILECs to harm end user customers by permitting the ILECs to shift recovery to less competitive markets and customer segments. Access reform should not hand ILECs weapons to attack competition and harm customers, nor seek to insulate ILECs from competitive pressures and declining access revenues. Reform should subject ILEC access charges to competitive pressures. The SLC cost recovery mechanism, however, simply would permit ILECs to overcharge customer segments where they possess the most market power.

Accordingly, the proposed SLC recovery mechanism should be rejected because it unjustifiably favors ILECs.

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[24] *See generally, Access Reform Order*, *supra* n. 10.

[25] In the *Omaha Forbearance Order*, the Commission found that Qwest is nondominant in provision of switched access services to the mass market in Omaha, Nebraska. *See Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. §160(c) in the Omaha Metropolitan Statistical Area*, Memorandum Opinion and Order, WC Docket No. 04-223 (rel. Dec. 2, 2005) ("*Omaha Forbearance Order*").

C. The Missoula Plan Violates the Act by Removing Transit from FCC and State Regulation and Would Permit ILECs to Exploit Their Market Power in Provision of Tandem Transit Service

The Plan proposes rules that would govern provision of Tandem Transit Service ("TTS") by any carrier.[26] As discussed in Section X.C., the Plan's attempt to remove transit from federal and state regulation violates the Act. The proposed TTS provisions, summarized below, also favor ILECs in a number of important respects.

Under the Plan, any ILEC offering TTS on the day before the Plan begins (Step 0) must continue to do so.[27] Providers already charging for TTS may not increase their rates during the first year, but may begin charging carriers a non-discriminatory rate if they had not previously charged all carriers for TTS.[28] TTS would be provided pursuant to "commercial agreement," capped at $0.0025 per MOU at or under 400,000 MOU between two switch points during Steps 2-3.[29] However, because under the Plan the TTS rate may be disaggregated into components (tandem switching and per mile common transport), the TTS rate for a particular switch may be higher.[30] For MOUs above 400,000, a premium rate of up to two times the cap may be charged.[31] At Step 4, the cap is removed for TTS provided entirely within an MSA.[32] At Step 5, the cap increases annually by inflation.[33] The tandem provider (usually the ILEC) in jointly

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26 *Plan* at §III.D.2.b., p. 50. The proposed rules would be default rules. Carriers could negotiate different terms and conditions of TTS. *Plan* at §III.D.2.c., p. 50. As a practical matter, however, the rules would apply primarily to ILECs as they are the dominant, and usually the only, TTS providers.

27 *Plan* at §III.D. Summary, p. 49; *Plan* at §III.D.2.a., p. 50.

28 *Plan* at §III.D.4.a., p. 51.

29 *Plan* at §III.D.4.b., p. 51.

30 *Plan* at §III.D.4.c., p. 52.

31 *Plan* at §III.D.5.b.2., p. 52.

32 *Plan* at §III.D.4.e., p. 52.

33 *Plan* at §III.D.4.b.ii., p. 51.

provided switched access arrangements may impose the TTS charge beginning at Step 3 for terminating access and at Step 4 for originating access (if the LEC has an originating rate of zero).[34]

1. ILECs Possess Market Power in Provision of Transit Service

As explained in Section X.C., the TTS provisions of the Plan are unlawful because they ignore the fact that ILECs' provision of TTS are subject to Section 251(c)(2) and that, consequently, ILECs must provide transit at cost-based rates. But even if the TTS provisions of the Plan were not unlawful, they are seriously flawed because they would permit unregulated treatment of TTS even though ILECs possess market power in provision of TTS.

Requiring ILECs to transit traffic furthers the fundamental goals of universal connectivity to the PSTN and promoting economic efficiency and competition. Transit traffic offers a simple and economical method for competing carriers to exchange relatively small amounts of traffic. Without TTS, customers of competitive carriers would not be able to call customers of other CLECs, independent LECs, cable providers, or CMRS carriers unless and until they were able to establish direct interconnection arrangements with each one of these carriers. In the *Virginia Arbitration Order*, the Wireline Competition Bureau found that giving an ILEC unilateral authority to discontinue transit traffic creates "too great a risk that [a CLEC's] end users might be rendered unable to communicate through the public switched network."[35] The Plan does just that.

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34 *Plan* at §III.D.7.b.-c., p. 54.

35 *Petition of AT&T Communications of Virginia Inc., Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia Corporation Commission Regarding Interconnection*, 17 FCC Rcd 27039, ¶118 (2002) ("*Virginia Arbitration Order*").

All LECs interconnect with the ILEC out of necessity because the ILEC is the dominant provider in its service territories. As such, the ILEC is dominant in provision of transiting. As the Michigan Commission found:

> absent transiting, new competitors would face a significant barrier to entry due to their inability to simultaneously interconnect with every other LEC. Further, given that an important purpose of the FTA is to encourage the development of competition in local exchange markets, the Commission is not persuaded that the FTA should be interpreted to allow Ameritech Michigan to refuse to perform transiting services. Indeed, nothing in the FTA suggests that Ameritech Michigan may refuse to resell any element, function, or group of elements and functions to AT&T for use in the transmission, routing, or other provision of the telecommunications service simply because a direct interconnection with AT&T and another telecommunications provider might obviate the necessity for Ameritech Michigan to perform transiting service. For a competitive marketplace to flourish, new entrants must be able to provide service to customers in an economically viable manner.[36]

Without TTS, customers of competitive carriers would be unable to call customers of other CLECs, independent LECs, cable providers, or CMRS carriers unless and until they were able to establish direct interconnection arrangements with each one of these carriers.

As recognized by the Commission, however, the availability of tandem transit service is increasingly critical to establishing indirect interconnection among carriers and transit service is an efficient way to interconnect carriers that do not exchange significant amounts of traffic.[37]

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36 *Petition of AT&T Communications of Michigan, Inc, for arbitration to establish an interconnection agreement with Ameritech Michigan*, MPSC Case Nos. U-11151, U-11152, Order Approving Agreement Adopted by Arbitration (Nov 26, 1996). *See also, Application of Sprint Communications Company, LP for Arbitration to Establish an Interconnection Agreement with Ameritech Michigan*, MPSC Case No. U-11203, Order Approving Arbitration Agreement with Modifications (Jan 15, 1997).

37 *Developing a Unified Intercarrier Compensation Regime*, Further Notice of Proposed Rulemaking, CC Docket No. 01-92, FCC 05-33, ¶ 125 (rel. March 3, 2005) ("*FNPRM*").

The fact that ILECs possess market power in provision of transit services is evident by their actions to discourage competitive provision of transit services. For example, Verizon has thwarted the ability of Neutral Tandem to offer competitive transit service, both directly and through its CMRS affiliate, Verizon Wireless. Verizon initially refused Neutral Tandem's request to interconnect on the grounds that Neutral Tandem could not exchange third-party traffic with Verizon under an interconnection agreement.[38] Similarly, Verizon Wireless has thwarted Neutral Tandem's offer to provide a more efficient, less expensive transit service than its affiliate Verizon by refusing direct interconnection. Neutral Tandem has been forced to seek FCC intervention to force direct interconnection with Verizon Wireless.[39] As Integra explained:

> Verizon Wireless has an incentive to refuse to interconnect with Neutral Tandem. Verizon Wireless' incumbent LEC parent company has taken the position that Neutral Tandem cannot resell transit services to deliver traffic to Verizon Wireless in territories where Verizon is the incumbent LEC. By refusing to interconnect directly with Neutral Tandem, Verizon Wireless, along with its incumbent LEC parent, is executing a squeeze play to maintain a monopoly on tandem services. This anti-competitive conduct is especially apparent when viewed in conjunction with other efforts to stifle alternative tandem services that are currently pending before the Commission.[40]

ILECs cannot have it both ways. They cannot claim that TTS is a competitive service that should be subject to commercial agreement, no regulatory oversight, and largely uncapped

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38 *Petition of Time Warner Cable for Declaratory Ruling that Competitive Local Exchange Carriers May Obtain Interconnection Under Section 251 of the Communications Act of 1934, as Amended, to Provide Wholesale Telecommunications Services to VoIP Providers*, WC Docket No. 06-55, Neutral Tandem, Inc.'s Reply Comments in Support of Time Warner Cable's Petition for Declaratory Ruling, p. 6-7 (filed April 25, 2006).

39 *Petition of Neutral Tandem, Inc. for Interconnection with Verizon Wireless, Inc. Pursuant to Sections 201(a) and 332(c)(1)(B) of the Communications Act of 1934, as Amended*, WC Docket No. 06-159 (filed August 2, 2006).

40 *Petition of Neutral Tandem, Inc. for Interconnection with Verizon Wireless, Inc. Pursuant to Sections 201(a) and 332(c)(1)(B) of the Communications Act of 1934, as Amended,* WC Docket No. 06-159, Comments of Integra Telecom Holdings, Inc., In Support of Petition, p. 4, (filed Sept. 8, 2006) (citations omitted).

rates, and at the same time thwart the provision of competitive TTS. The fact that Neutral Tandem has had so many difficulties establishing its alternative transit service verifies that ILEC TTS is still a bottleneck service that must remain regulated.

Because ILECs possess market power in provision of TTS it is clearly in the public interest for an intercarrier compensation reform plan to govern their provision of TTS. Requiring ILECs to transit traffic furthers the fundamental goals of universal connectivity to the PSTN and promoting economic efficiency and competition. Transit traffic offers a simple and economical method for competing carriers to exchange small amounts of traffic. Requiring ILECs to provide transit service also furthers the goal of opening local markets to competition.[41]

Unfortunately, however, as discussed below, the Plan would permit ILECs to exploit their market power to the disadvantage of competitors and it is not, therefore, competitively neutral.

2. ILECs Could Discontinue Provision of TTS

An alarming aspect of the Plan is that it has no provisions that require ILECs to continue to provide TTS. For example, assuming the Plan were adopted, between the adoption date and the effective date, an ILEC could unilaterally discontinue TTS. On the effective date of the Plan, the ILEC would no longer be required to provide TTS (because it was not providing it the day before the Plan became effective) and, under the Plan, neither the state commission nor FCC would have authority to order the ILEC to provide it.

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[41] *Petition of AT&T Communications of Michigan, Inc, for arbitration to establish an interconnection agreement with Ameritech Michigan*, MPSC Case Nos. U-11151, U-11152, Order Approving Agreement Adopted by Arbitration, Nov 26, 1996; *See also, Application of Sprint Communications Company, LP for Arbitration to Establish an Interconnection Agreement with Ameritech Michigan,* MPSC Case No. U-11203, Order Approving Arbitration Agreement with Modifications, Jan 15, 1997.

This result raises the very real possibility of complete chaos and balkanization of the PSTN. In order to avoid this scenario and to ensure that every user on the PSTN can communicate with every other PSTN user, the Commission must assure that any intercarrier compensation reform plan provides for continued regulation of the terms and conditions of ILEC provision of TTS.

Permitting an ILEC to discontinue TTS, or provide it on commercial terms that are not subject to regulatory scrutiny and non-discrimination requirements, creates a competitive advantage for the ILEC, and a corresponding competitive disadvantage and market entry barrier for CLECs and other carriers that rely on ILEC TTS.

3. ILECs Could Compel CLECs To Establish Unnecessary and Inefficient Direct Connection

For small traffic volumes, it is more efficient for competitive carriers to interconnect indirectly via ILEC TTS than to establish direct interconnection. Direct interconnection will make sense from an economic efficiency perspective when traffic volumes are sufficient to justify higher capacity direct interconnection trunks between competitive carriers or between a competitive carrier and a CMRS provider.

But the Plan could result in CLECs being required to establish direct interconnection when it is not efficient to do so. First, ILECs simply could refuse to provide transit service, requiring CLECs to directly interconnect even for very small volumes of traffic. Second, and perhaps more likely, ILECs could charge above-cost prices for TTS which could drive CLECs to establish direct interconnections. For example, assume that the cost of a DS-1 to interconnect a CLEC and CMRS carrier directly is $482.24 over a span of 15 miles (V&H). At the TTS rate of $0.005, it would be more cost efficient for the CLEC and CMRS carrier to interconnect directly when the traffic level reaches 96,440 MOU per month. However, the capacity of a DS-1 is 1.04

million MOU per month. Thus, the inflated TTS rate would provide economic incentives for the carriers to interconnect before it would be justified from a network efficiency perspective. In addition, this could have other adverse consequences, such as switch port exhaust and/or stranded facilities.

Accordingly, the TTS provisions of the Plan are both inefficient and competitively unneutral because they could require CLECs to engage in inefficient direct interconnection.

4. Proposed TTS Rates Are Too High

As discussed in later sections of these comments, the Plan's proposed rates—$0.0025, $0.005, and uncapped rates for service provided wholly within an MSA—are unlawful under the pricing standard of Section 251(d)(1). Additionally these rates are not competitively neutral because they substantially exceed costs. TTS is comprised of tandem switching and transport functions. Numerous state commissions have evaluated ILEC rates for these functions in UNE cost proceedings. The average of the cost-based state rates for these two functions is $0.0015.[42] But the Plan permits ILECs to charge much higher rates, or even any rate where rates are uncapped. In this connection, most ILEC tandem service areas are wholly within an MSA. MSAs are large areas that may encompass entire states. Since its rates are uncapped when within a single MSA, the proposed caps for TTS rates are illusory because they would apply in very limited instances.

Accordingly, the Commission also should reject the Plan because the TTS provisions would favor ILECs by permitting them to charge above-cost rates in most circumstances. Any

[42] *See* Attachment 1.

intercarrier compensation plan must provide for reasonable caps on provision of ILEC transit services.

D. Multiple Edges Advantage ILECs

Under current law, CLECs are entitled to interconnect with ILECs at a single point of interconnection ("POI") per local access and transport area ("LATA").[43] This rule ensures a level playing field between competitors and incumbents. The current rule is explicitly neutral with respect to technology or type of carrier, because it simply establishes a standard ("one POI per LATA") that does not refer to a type of technology, a type of carrier or a network architecture. In effect, the rule recognizes that the incumbents' hierarchical, hub-and-spoke network architecture is not necessarily a forward-looking architecture that promotes efficient competition. In contrast, the Plan takes a significant step backward by permitting *incumbents* to designate multiple POIs per LATA based on incumbent technology and architecture (*i.e.*, at each ILEC tandem in a LATA). Moving to multiple POIs will impose substantial network regrooming costs on competitors. Adding insult to injury, if the competitor does not have facilities available to reach the incumbents' Edges, the Plan also requires competitors to pay tariffed access rates for interconnection facilities. This aspect of the Plan abrogates CLECs' rights to cost-based interconnection under Sections 251 and 252 of the Communications Act of 1934, as amended ("Act"). In short, the Plan would increase competitors' costs by requiring them to establish more facilities to more locations, at a greater cost per unit of transport, with no net benefit—except to ILECs.

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[43] *See Application by SBC Communications, Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Texas*, Memorandum Opinion and Order, CC Docket No. 00-65, FCC 00-238, ¶ 78 (rel. Jun. 30, 2000) ("*Texas 271*").

1. A Single POI per LATA Is Consistent with the Act and Should Be Retained As the Default Rule

The existing requirement for a single POI in a LATA is the only alternative proposed to date that the Commission already has found satisfies the requirements of the Act. The Act and FCC rules define each party's interconnection and compensation rights and duties. Section 251(c)(2) imposes special interconnection duties on ILECs.[44] For example, the Act and the FCC recognize that new entrants must be able to determine the most efficient location for the exchange of traffic. Thus, the Act grants CLECs the right to select the POI, which an ILEC must provide at any technically feasible point selected by the CLEC.[45]

The interaction between carriers' interconnection duties and their compensation obligations determines the financial responsibilities each party bears for transporting its originating traffic. Both competitive and incumbent LECs are subject to Section 251(b)(5).[46] This Section requires that each party: (i) establish reciprocal compensation arrangements for the transport and termination of telecommunications;"[47] (ii) bear financial responsibility for transporting its originating telecommunications traffic to the point of interconnection selected by the requesting carrier;[48] and (iii) compensate the terminating carrier for the transport[49] and

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44 47 U.S.C. § 251(c)(2).

45 47 U.S.C. § 251(c)(2)(B).

46 47 U.S.C. § 251(b)(5).

47 *Id.*

48 47 C.F.R. § 51.703(b); *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499 (1996), *vacated in part, Iowa Utilities Board v. FCC*, 120 F.3d 753 (8th Cir. 1997), *rev'd in part, aff'd in part*, *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 119 S. Ct. 721 (1999) ("*Local Competition Order*"), at ¶¶ 1042, 1062; *Petition of WorldCom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia Inc., and for Expedited Arbitration*, CC Docket Nos. 00-218 *et al.*, Memorandum Opinion and Order, DA 02-1731, at ¶ 52 (rel. Jul. 17, 2002) ("*FCC Arbitration Order*").

termination services provided to terminate the call.[50] Together, the ILEC's interconnection and compensation duties, sometimes referred to as "the rules of the road," require the ILEC to bear financial responsibility for delivering traffic originated by its customers to the terminating carrier's chosen POI.[51]

Requiring the originating LEC to bear the costs of delivering its originating traffic to the POI selected by the terminating carrier, and to compensate the terminating carrier for the transport and termination functions it performs, is a function of the current calling-party's-network-pays ("CPNP") regime.[52] As the Commission has found, a LEC's costs of delivering its originating traffic to the network of a co-carrier are recovered in the LEC's end users' rates. The FCC has explained its rationale as follows:

> In essence, the originating carrier holds itself out as being capable of transmitting a telephone call to any end user, and <u>is responsible for paying the cost of delivering the call to the network of the co-carrier</u> who will then terminate the call. Under the Commission's regulations, <u>the cost of the facilities used to deliver this traffic is the originating carrier's responsibility,</u> because these facilities are part of the originating carrier's network. <u>The originating carrier recovers the costs of these facilities through the rates it charges its own customers for making calls.</u> This regime represents "rules of the road" under which all carriers operate, and which make it possible for one company's customer to call any other customer even if that customer is served by another telephone company.[53]

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49 FCC rules define transport as "the transmission… of telecommunications traffic…from the interconnection point between the two carriers to the terminating carrier's end office switch that directly serves the called party." 47 C.F.R. § 51.701(c).

50 47 U.S.C. § 251(b)(5); 47 C.F.R. §§ 51.701(e), 51.703(e).

51 *TSR Wireless, LLC. v. U S West Communications, Inc.,* File Nos. E-98-13, E-98-15, E-98-16, E-98-17, E-98-18, Memorandum Opinion and Order, FCC 00-194, ¶ 34 (rel. June 21, 2000) ("*TSR Wireless*"), *aff'd, Qwest Corp. et al. v. FCC et al,* 252 F.3d 462 (D.C. Cir. 2001); *FCC Arbitration Order* at ¶ 67.

52 *NPRM* at ¶ 9.

53 *TSR Wireless* at ¶ 34 (emphasis added).

Pre-empting and standing in the place of the Virginia Commission, the FCC's Wireline Competition Bureau ("Wireline Bureau") considered Verizon's arguments concerning the interpretation of the FCC's rules and paragraphs 199 and 209 of the *Local Competition Order* and it resolved that dispute by rejecting the ILEC proposal for multiple POIs in a LATA entirely.[54] In addition, the Wireline Bureau clarified that under FCC rules, the ILEC also must compensate the CLEC for the dedicated transport that the CLEC provides from the POI to the CLEC's switch, at which point the termination portion of reciprocal compensation applies.[55] Several federal courts have upheld this interpretation of the Act.[56]

The Plan upsets these settled interconnection obligations. At the core of the Plan is the reality that an ILEC would either deny a requesting carrier its right under federal law to designate the POI, or penalize the requesting carrier for exercising its federal rights by charging higher rates for the transport capacity used to interconnect the two networks. Rather than

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54 *FCC Arbitration Order* at ¶¶ 39, 51-54.

55 *FCC Arbitration Order* at ¶¶ 66, 67 n. 187. The *FCC Arbitration Order* provides a succinct summary of the obligations an ILEC bears under federal rules: (1) competitive LECs have the right, subject to questions of technical feasibility, to determine where they will interconnect with, and deliver their traffic to, the incumbent LEC's network; (2) competitive LECs may, at their option, interconnect with the incumbent LEC's network at only one place in a LATA; (3) all LECs are obligated to bear the cost of delivering traffic originating on their networks to interconnecting LECs' networks for termination; and (4) competitive LECs may refuse to permit other LECs to collocate at their facilities.

56 *MCIMetro Access Transmission Services, Inc. v Bellsouth Telecommunications, Inc.*, 352 F.3d 872, 879-880 (4th Cir. 2003) (CLECs should be allowed to select any POI within the incumbent's network to interconnect. Additionally, ILECs are responsible for the cost of transporting traffic that originates on its side of the POI. Rule 703(b) "is unequivocal in prohibiting LECs from levying charges for traffic originating on their own networks, and, by its own terms, admits of no exceptions."); *Southwestern Bell Tel. Co. v Public Utility Com'n of Texas*, 348 F.3d 482, 486 (5th Cir. 2003) (Court found that FCC had previously confirmed that: "[] a CLEC is permitted to choose to interconnect with ILECs at any technically feasible point, including a single-LATA-POI; and, [] an ILEC is prohibited from imposing charges for delivering its local traffic to a POI outside the ILEC's local calling area." CLECs can choose the most efficient points at which to exchange traffic with ILECs and ILECs are prohibited "from assessing 'charges on any other telecommunications carrier for telecommunications traffic that originates on the [ILEC]'s network.'"); *MCI Telecomm. Corp. v Bell Atlantic-Pennsylvania*, 271 F.3d 491, 517 (3d Cir. 2001) ("… CLEC cannot be required to interconnect at points where it has not requested to do so."); *U.S. West Communs. v MFS Intelenet, Inc.*, 193 F.3d 1112, 1124 (9th Cir. 1999), cert. denied, 530 U.S. 1284 (2000) (local exchange carriers must permit interconnection at any technically feasible point within their network).

permitting the CLEC to choose the most efficient point for traffic exchange, the Plan permits the ILEC to choose multiple Edges in each LATA to which CLECs must deliver their originating traffic. The Edge is a POI by another name. The Plan abandons ten years of interconnection law by granting the *ILEC* the right to select *multiple* POIs per LATA based on embedded ILEC technology and architecture. Because this violates the Act and the FCC's principles of economic efficiency and competitive and technological neutrality, the Commission should reject the Plan's interconnection provisions.

2. The Plan's Edge Provisions Disproportionately Impose Costs on Competitors

ILECs' networks are typically hub-and-spoke networks made up of multiple end offices connected to a single tandem, often with multiple tandems in each LATA. These networks were designed based on legacy network infrastructure and technological limitations of telecommunications equipment, not the least of which was the reality that a network consisting of copper distribution facilities realized significant service degradation the further a customer was situated from their serving central office. Advances in telecommunications technology and equipment eliminated the need for this hub and spoke network design and permitted competitors to design and deploy more efficient networks. Thus, competitors typically deploy one switch and more transport to serve an entire LATA or, in some cases, multiple LATAs. Current rules recognize these differences and balance the interest of incumbent and entrants. The existing rules ensure that ILECs will not be able to raise their rivals' costs by forcing them to mimic the ILECs' historical architecture. At the same time, by requiring interconnecting carriers to establish at least one POI in each LATA, the rules prevent interconnecting carriers from forcing ILECs to transport traffic to a single POI serving several LATAs. The Plan takes a huge step backward by requiring competitors to adopt an inefficient network design to interconnect with

ILECs—to the sole benefit of ILECs. Based solely on the differences between network models, competitors would have obligations to haul traffic to multiple Edges whereas ILECs may only have an obligation to haul their originating traffic to a single Edge of a competitor's network.[57] This aspect of the Plan unfairly advantages the historical ILEC network architecture and imposes significant interconnection costs on competitors, violating the FCC's principles of competitive and technological neutrality.

For example, assume that a competitor serves a large LATA in which the ILEC has three tandems spread across the LATA. The competitor serves the LATA with a single switch and transport rings. The competitor currently interconnects at a single POI per LATA and pays the ILEC reciprocal compensation to terminate its traffic across the LATA. The ILEC has the same obligation to the competitor. Under the Plan, if the competitor wishes to maintain its single POI at an ILEC local tandem, it would have to pay to transport all traffic in both directions between the ILEC's local tandem and its switch.[58] So long as the ILEC designates each access tandem as an Edge, the competitor also would be required to pay for dedicated special access circuits to these additional ILEC Edges, regardless of whether it had one or one-hundred customers in each tandem serving area and regardless of whether it terminated one or one million minutes of use to each ILEC tandem serving area.

If the competitor wanted to avoid paying for transport in both directions, it could accede to the ILEC's demands to establish a POI at each of the three access tandem Edges, potentially stranding the facilities it had established to the local tandem. The competitor then would get the

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[57] As explained in Section IV.E., ILECs may not even bear the cost of delivering their originating traffic to a CLEC's Edge if the traffic is out of balance.

[58] *Plan* at §II.E.3.d.iii., p. 32.

"benefit" of (1) the ILEC bearing financial responsibility for transporting its originating traffic to the CLEC's Edge (a responsibility the ILEC has today) and (2) paying interstate dedicated access rates to reach each ILEC Edge (instead of the UNE rates the competitor is entitled to today).[59] As explained below, even these rates do not meet the Act's requirement that ILECs provide interconnection at cost-based rates. To the contrary, access rates are typically higher than UNE rates, sometimes three times higher.[60]

ILECs also could impose significant costs on competitors by designating and changing multiple edges. Although the ILEC is required to give competitors advance notice of new Edge designations, there is nothing in the Plan to prevent an ILEC from immediately designating all three tandems in a LATA as Edges once the Plan is adopted, requiring competitors to purchase dedicated access circuits to reach those Edges, then establishing a media gateway at yet another location one year later and moving all traffic from the multiple tandems to the media gateway. Because special access rates are typically heavily discounted when purchased under term and volume discounts, this aspect of the Plan is particularly troubling. In essence, an ILEC could designate multiple Edges to lock competitors in to long term commitments, then impose termination penalties on its competitors when they are forced to reconfigure their network to the newly designated Edge.

In sum, because the Plan's Edge provisions are not competitively or technologically neutral, the FCC should reject them.

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59 *Plan* at §II.E.3.c.iii., p. 31.

60 *See, e.g.*, Comments of ATX Communications Services, Inc. *et al.*, WC Doc. 05-25, at 5-7 (filed June 13, 2005); Reply Comments of ATX Communications Services, Inc. *et al.*, WC Doc. 05-25, at 7-10 (filed July 29, 2005).

3. Network Architecture Is Not An Intercarrier Compensation Issue.

The rules of the road establish that network interconnection is separate from transport and termination. Because they are separate, when reforming the intercarrier compensation system, there is no principled reason to reform interconnection obligations. As explained above, the law concerning interconnection obligations is settled and the FCC's current rules interpreting the law have been upheld by numerous courts. The FCC should not disturb its interconnection rules.

Although the Plan's sponsors fail to admit it, the proposed interconnection rules incorporate changes that the ILECs have been litigating before state commissions and federal courts for the past ten years. Since they have been unsuccessful in getting the courts to change their obligations, they are now using the guise of intercarrier compensation reform to upset the FCC's settled interconnection rules to their advantage. While the Plan proponents may argue that interconnection deeper in the ILEC's network is necessary given the target rate of $0.0005, that is a red herring. The answer is not to change settled interconnection law, but rather to increase the target rate to reflect economic cost. As explained in Section X.A., the average cost-based rate for local and tandem switching, plus common transport, is approximately $0.003, or six times higher than the target rate for Track 1 carriers proposed in the Plan The FCC should not upset ten years of interconnection rules that have promoted local competition on the false premise that such changes are necessary to support a below-cost intercarrier compensation rate.

E. Treatment of Out-of-Balance Traffic Is Not Competitively Neutral

The Plan adopts new rules concerning out-of-balance traffic that violate the interconnection rules of the road discussed above and the FCC's intercarrier compensation principles of promoting economic efficiency and competitive neutrality.

The Plan adopts rules requiring carriers terminating out-of-balance traffic to bear financial responsibility for ALL transport between the two interconnecting carrier's Edges.[61] Under the Plan, the carrier terminating the larger amount of non-access traffic (more than three-to-one terminating to originating), has the financial obligation to pay to transport all traffic in both directions between the two Edges.[62] This is a fundamental departure from the rules of the road discussed above, which require the originating carrier to be responsible for the cost of the transport and termination of traffic its customers originate. In short, the carrier originating the traffic, who has already collected rates from its end users sufficient to compensate it for the transport and termination of the call, avoids a substantial portion of the cost of transporting *all* of its traffic that is terminated by the out-of-balance carrier.

Because new market entrants typically terminate more traffic than they originate, this is another provision designed to penalize competitors and impose additional, unwarranted costs on them. Since the Plan prices interconnection facilities at above-cost access rates, it also permits ILECs to recover their costs twice, once from their end user and a second time from the competitor transporting and terminating the call.

The Plan gives ILECs yet another undue advantage. After the rate is unified, there are two possible ways to treat traffic that was "access" (251(g)) prior to the unification. First, if the distinction between non-access (251(b)(5)) and access (251(g)) is maintained, even though the rate is the same, then access (251(g)) traffic will not count toward the 3:1 ratio. That would

[61] Only non-access traffic is counted when determining the 3:1 ratio, and thus whether the out-of-balance transport penalty is triggered. Yet the Plan does not make the same distinction with respect to the type of originating traffic that the terminating carrier must pay to transport between the Edges. Although not specified clearly, it appears that the terminating carrier would be responsible for transporting *all* traffic—access and non-access—between the two Edges.

[62] *Plan* at § II.E.3.d.i., p. 31.

maximize the disparity between inbound and outbound traffic for CLECs that today terminate out-of-balance, non-access traffic. The Plan adopts this alternative for Track 3 carriers.[63] Thus, CLECs are more likely to continue to be required to bear the brunt of transport obligations with respect to all traffic exchanged (access and non-access) with Track 3 ILECs, even after rates are "unified."

Second, in the alternative, at the same time as the rates are unified the Plan could eliminate the access category (251(g)) and unify all traffic under the non-access category (251(b)(5)). The Plan adopts this alternative for Track 1 and 2 carriers, but limits it to terminating "access" traffic. In short, the Plan increases the likelihood that a CLEC will have out-of-balance traffic after so-called "unification" because only terminating, not originating, "access" traffic will count in determining the balance of traffic.

The Plan's out-of-balance transport penalty is a veiled effort to impose additional and unwarranted costs on ILEC competitors. The FCC should therefore reject this aspect of the Plan.

F. Phantom Traffic Rules Favor ILECs

In an effort to address the "phantom traffic problem,"[64] the Plan creates allegedly "compromise" rules that are intended to alleviate the problems associated with phantom traffic. Specifically, the Plan includes call signaling rules, technological exceptions to these call signaling rules, enforcement rules for carriers that violate the call signaling rules and a process for the generation and exchange of call detail records. While many of these concepts could be

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[63] *Plan* at §II.E., n.9, p. 30.

[64] Phantom traffic is a broad term that has been used by many in the industry to describe various types of traffic including: (1) traffic that a terminating carrier receives but cannot bill because the terminating carrier is unable to identify the carrier responsible for payment; and (2) traffic that the terminating carrier cannot bill because it is unsure of the call's jurisdiction.

helpful in alleviating the problems associated with phantom traffic, the Plan does not include any of the essential details that would permit other parties to comment meaningfully on these proposals. For those details that are provided, the phantom traffic proposal creates more questions and uncertainty, rather than solving the phantom traffic problem. What is clear, however, from the Plan is that the phantom traffic and call detail record proposals are crafted to favor ILECs and harm other carriers, such as CLECs, wireless providers, cable companies and VoIP companies.

At this time the core problem with the phantom traffic proposal, including the proposal related to the process of generating and exchanging call detail records (CDRs) is that they simply are not complete. For instance, the Plan indicates that *after* an industry proposal for the creation and exchange of call detail records is filed with the Commission, the proponents supporting the Plan will advocate that the Commission release an interim phantom traffic solution. However, to date, the Plan proponents have not filed any additional proposals with the Commission and therefore, it is not possible at this time to comment substantively on the proposed rules.[65]

Assuming the Commission would consider the interim phantom traffic proposal set forth in the Plan in the absence of proposed CDR rules,[66] the Commission should not implement the interim rules for a number of reasons. First, any rules concerning call signaling should apply only in the absence of agreements between interconnecting carriers concerning how to handle phantom traffic. Agreements between interconnecting carriers are preferable to rules because

65 The Plan indicates that the call detail record proposal was to be filed with the Commission 60 days after the Plan was filed on July 18, 2006. As of October 24, 2006, no proposal has been filed.

66 It is not clear whether the proponents of the Plan are even asking the Commission to consider the interim phantom traffic proposal absent the filing of a proposal concerning the creation and exchange of call detail information.

such agreements address the distinct network interconnection architecture arrangements between carriers. Further, many carrier-to-carrier agreements include provisions that address how to handle phantom traffic, including applicable dispute resolution provisions. Accordingly, the Commission should not implement any rules that would disrupt these agreements, which are the result of arms-length negotiations between carriers and market forces. This includes the proposed rules concerning enforcement of the call signaling rules and remedies for violators. Indeed, these proposed rules could result in increased and unnecessary costs for carriers who are dragged into call signaling enforcement proceedings at the FCC where such costs could be avoided through dispute resolution procedures in carrier agreements.

Many of the details concerning the enforcement rules and remedies are not included in the proposal, but rather have been punted to the FCC for its consideration. These include procedures for discovery of facts, rebuttal of claims and assertions of defenses and counterclaims, as well as procedures to determine whether a carrier qualifies as a chronic violator of the call signaling rules requiring such carrier to establish direct interconnection agreements with applicable terminating carriers. Since the Plan requests the FCC to fill in these gaps and provides little detail, it is not possible to comment substantively on these provisions. Accordingly, to the extent the FCC considers implementing separate enforcement rules and remedies, such rules must be subject to proper notice and comment and a rulemaking. Further, if the enforcement rules and remedies, as well as call signaling rules, ultimately are adopted, such rules should be the default in the event a interconnecting carrier's agreements do not address these phantom traffic issues.

The Plan also proposes an interim phantom traffic solution to be implemented prior to adoption of the comprehensive Plan and contingent upon the coalition members' support of the

Plan as a whole.[67] The Commission should not implement these procedures. First, these interim rules do not take into account the significant costs that likely will be incurred by carriers in order to comply. Indeed, the Plan is devoid of any information of how much it could cost carriers to upgrade their networks and systems in order to supply call detail records; however, it is clear that carriers will need to make changes to exchange records that are not covered by the MECAB process. There is little question that these changes will require an upgrade in systems for all interconnected carriers that are required to comply and this appears to include certain carriers, like VoIP providers, that may not have any systems in place for generation or processing of call detail records.

Furthermore, the Plan requires that each originating provider sending traffic via a tandem transit provider compensate the tandem transit provider $0.0025 per record when the tandem transit provider supplies call detail records to terminating providers. This provision should not be implemented because (a) there is no evidence that the $0.0025 charge is cost-based; and (2) this provision benefits ILECs who typically are the only tandem transit providers and harms other carriers who do not provide tandem transit services. Indeed, originating carriers not only must compensate the tandem transit provider who provides CDRs to a terminating provider, but such originating provider will not be compensated for any costs it incurs to provide call detail information to the tandem transit provider. Finally, the Plan does not include many of the pertinent details concerning an interim call records process, such as the specific call detail information that will be exchanged, when such information will be exchanged and the format in which the information will be provided. Thus, while the Plan calls for interim rules to be

[67] In light of the withdrawal of certain Plan proponents since the Plan was filed with the Commission, it is unclear whether the Plan members are still advocating for the implementation of an interim phantom traffic solution.

implemented, it is devoid of the requisite details concerning those rules to permit other parties to comment meaningfully on these proposals. To the extent, the Plan proponents submit further details at a later time, the Commenters will respond accordingly.

G. Competitors Cannot As A Practical Matter Negotiate and Arbitrate Interconnection Agreements with Numerous Small ILECs

Under the Plan, a carrier may request a formal interconnection agreement from any other carrier for the exchange of non-access traffic pursuant to the negotiation and arbitration procedures in Section 252 of the 1996 Act.[68] According to FCC statistics, there are approximately 807 ILECs, 374 CLECs and 155 wireless carriers operating in the United States.[69] The Plan would provide each one of these carriers the opportunity to request formal interconnection negotiations with any other ILEC, CLEC, or wireless carrier. This means that any one carrier could potentially be required to enter into hundreds of separate interconnection agreements. Negotiating interconnection agreements or traffic exchange agreements takes time and resources that many small competitors do not have, or are better deployed towards growing the business and serving customers. Although the Plan is ambiguous as to whether such negotiated agreements are required, the Plan nonetheless gives each carrier the right to demand formal negotiations under Sections 252 and therefore the threat of such onerous negotiations exists. The Section 252 process takes at least nine months from beginning to end, and could involve expensive and time consuming arbitration before a state commission. Requiring CLECs

68 *Plan* at § III.B.1.a.-b., p. 55.

69 *See Local Telephone Competition Status as of December 31, 2005,* Industry Analysis and Technology Division Wireline Competition Bureau (July 2006), Tables 13, 14.

potentially to negotiate individual agreements with hundreds of other carriers, including hundreds of small rural ILECs, is not a practical option.

Although the Plan provides for interim agreements,[70] those merely implement the Plan, which as noted, is not competitively neutral in numerous respects. In other words, all a rural LEC has to do is request an agreement and it wins by default unless a CLEC has resources to arbitrate with each LEC. Therefore, interim agreements are not an acceptable alternative for competitive carriers.

Accordingly, the Plan is not competitively neutral because it imposes unrealistic burdens on CLECs.

V. THE PLAN WOULD HARM UNIVERSAL SERVICE

A. The Plan Would Burden the USF Contribution Base with Support Unrelated to Universal Service

The Plan describes the current universal service funding mechanism as "collapsing"[71] "inherently unstable,"[72] and "declining."[73] Incredibly, however, the Plan would impose its proposed enormous, 32%, increase in costs on the same contribution base that funds today's universal service programs.[74] The Plan also makes the arresting statement that "revenues carriers receive from universal service funding and the Restructure Mechanism … will, in many cases,

70 *Plan* at § III.A.1.a., p. 55.

71 *Plan* at Appendix B, p. 89

72 *Plan* at Appendix B, p. 88

73 *Plan* at Appendix B, p. 88

74 *Plan* at Appendix B, p. 88. Of course, there is no basis for imposing the costs of the Restructure Mechanism on any other customer base either. One possible exception might be for ILECs to establish among themselves and their customers various support mechanisms so that, for example, ILEC customers, but not CLEC customers, pay additional amounts to make up for lost ILEC intercarrier compensation revenues.

have to be increased."[75] In other words, ILECs sponsoring the Plan hope to burden consumers with costs even beyond those contemplated now in the Plan.

Given the "collapsing" "unstable" state of USF funding there can be no doubt that the Commission may not impose the costs of the proposed Restructure Mechanism on the current contribution base. Moreover, it would be highly imprudent for the Commission to adopt the Restructure Mechanism, even if the Commission were to reform and broaden the USF contribution base, without considerable experience and confidence that any new contribution methodology is working and adequately funding existing programs.[76] This is particularly the case since ILECs view the Restructure Mechanism as merely the beginning of additional demands for support. Accordingly, even if for no other reason, because of the risk of overburdening the USF contribution base, the Commission should not adopt the Plan.

In addition, however, the Commission should not impose the costs of the Plan on the USF customer base because the Plan is unrelated to universal service. Notably absent from the Plan is any description of how the Restructure Mechanism is related to universal service goals (or how it would be lawful under Section 254). [77] The increased level of contributions that the Plan apparently envisions imposing on consumers are not apparently related to any USF program such as high cost support or lifeline programs. The Plan makes absolutely no effort to explain how or if the Plan would support universal service.

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75 *Plan* at Appendix B, p. 88.

76 *See generally*, *Universal Service Contribution Methodology*, WC Docket No. 06-122, *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45.

77 As explained elsewhere in these comments, because the various restructure funds proposed in the Plan have no apparent relationship to universal service goals, the FCC has no authority to establish them.

The Commission already has removed implicit subsidies from interstate access charges. In the *CALLS Order*, the Commission stated that its decision adopting the CALLS plan removed "implicit subsidies from the interstate access charge system and replace[d] them with a new interstate access universal service support mechanism "[78] The Commission stated that "the CALLS Proposal reduces, and in most instances eliminates, implicit subsidies among end-user classes …"[79] The Commission observed that the new $650M fund it established satisfied "section 254's goals that universal service support be explicit as well as specific, predictable, and sufficient."[80] Similarly, the Commission stated that the access reform for rate-of-return ILECs that it later adopted "converts identifiable implicit subsidies to explicit support."[81] Therefore, there is no justification for shifting further recovery to an already overburdened USF contribution base (or to end user charges), because the Commission already has removed implicit support from access charges of price cap and rate-of-return ILECs.

The Plan is a frank proposal to create a government-sponsored subsidy for ILECs over and above anything necessary to promote universal service, especially with respect to the BOCs. Accordingly, if for no other reason, the Plan should be rejected because it would overburden the USF contribution base with unlawful increased contributions that have no relationship whatsoever to universal service goals.

[78] *Access Charge Reform*, Sixth Report and Order, CC Docket No. 96-262, FCC 00-193, ¶ 3, p. 12964 (rel. May 31, 2000) ("*CALLS Order*").

[79] *Id*. at ¶ 29, p. 12974.

[80] *Id*. at ¶ 201, p. 13046.

[81] *Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers*, Second Report and Order and Further Notice of Proposed Rulemaking, CC Docket No. 00-256, FCC 01-304, ¶ 12, p. 19620 (rel. Nov. 8, 2001).

B. The Plan Harms Customers With Low Usage

While the Plan overall harms consumers by burdening them unnecessarily with the costs of preserving ILEC revenues and insulating them from competitive forces, the Plan would be particularly harmful to end users with low usage. The Commission has recognized that shifting rate structures from usage sensitive to flat-rated charges can harm customers that make relatively few long distance calls because they will pay the higher flat rate charge regardless of usage.[82] On the other hand, customers with high usage would benefit if the new flat rated charge is less than previous usage charges. Therefore, the significantly increased flat rated SLCs, which under "pricing flexibility" rules ILECs may target to non-competitive customer segments, will harm residential customers with low usage.

The Plan fails to address the impact of its proposed rules on low usage customers. Although it provides an analysis of rates for various customer types, this assumes that the contribution base for universal service has been broadened to a numbers and connection-based approach.[83] However, the Commission may well choose not to adopt this USF funding approach. Further, even the analysis that was submitted shows that low usage customers may experience increases of up to 6%, for low volume wireline urban customers, for example.[84] The Plan does not address the impact of these and other increases for low volume users that do not qualify for Lifeline assistance. And, even these increases apparently are based on the flawed assumptions of the Clark/Makarewicz Study. With more realistic assumptions, the cost of the Plan to consumers would be much greater.

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82 *Access Reform Order* at ¶¶ 37, 38.

83 *Plan* at Exhibit 1.

84 *Plan* at Exhibit 1, Summary Matrix.

Accordingly, the Plan should be rejected because of the impact on low usage customers.

C. Revenue Recovery, If Any, Must Provide For Benefit Reductions Based On Competitive Line Loss For All ILECs

The Plan also would harm universal service because it would keep the same level of support for Track 2 carriers for several years, and for Track 3 carriers permanently, even if they lose lines. This feature of the Plan would overburden both legitimate and proposed unjustified support programs because it would maintain current support levels even if more efficient carriers are able to serve customers without support. ILECs are constantly parading before regulators the possibility of competition from cable, satellite providers, new technologies such as WIMAX, and even their own wireless operations.[85] ILECs claim that various competitive safeguards should be dismantled in light of this competition.[86] But assuming the prospect of significant competition from these sources is genuine, the worst possible step that the Commission could take would be to insulate ILECs from this competition by preserving support levels even if ILECs are unable to compete effectively. Consumers would be harmed because they would not receive the benefit of more efficient technologies. Any savings they might otherwise experience would be lost through increased contributions that they would be required to make in order to preserve ILEC revenues.

Accordingly, the Commission should reject the Plan because it would preserve support levels for some ILECs, even as they lose lines to more efficient providers.

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[85] *See e.g., Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. §160(c), SBC Communications Inc.'s Petition for Forbearance Under 47 U.S.C. §160(c), Qwest Communications International Inc. Petition for Forbearance Under 47 U.S.C. §160(c), BellSouth Telecommunications, Inc. Petition for Forbearance Under 47 U.S.C. §160(c),* Memorandum Opinion and Order, WC Docket Nos. 01-338, 03-235, 03-260, 04-48, 19 FCC Rcd 21496, ¶¶ 21-35 (rel. Oct. 27, 2004) ("*Broadband 271 Forbearance Order*"); *See also, Wireline Broadband Order* ¶3, n. 7.

[86] *See Broadband 271 Forbearance Order*, ¶¶*21-35; Wireline Broadband Order*, ¶3, n. 7.

VI. THE PLAN IS NOT EASY TO ADMINISTER AND WILL CREATE REGULATORY UNCERTAINTY

The Plan fails to satisfy the most fundamental goal of the Commission's request for a proposed future intercarrier compensation scheme – that "any new approach should promote economic efficiency."[87] By layering a complex, multi-year implementation schedule with a matrix of rates based on carrier size and traffic types, portions of which can be voluntarily ignored by fifty-one jurisdictions, on top of the current and acknowledged inefficient regulatory scheme, the Plan further exacerbates the Gordian Knot of intercarrier compensation. Plus, as previously discussed, adoption of the Plan would unnecessarily create inefficient networks. Accordingly, the Commission should summarily reject the Plan.

In its FNRPM issued approximately eighteen months ago, the Commission began the "process of replacing the myriad [of] existing intercarrier compensation regimes with a unified regime,"[88] requesting that any proposed future intercarrier compensation scheme simplify the current patchwork of regulation premised upon inefficient and outdated categorizations of traffic, carriers, and a call's end points. The Commission further noted that "any new approach should encourage the efficient use of, and investment in, telecommunications networks, and the development of efficient competition."[89]

In July 2006, the Plan proponents submitted what purported to be a comprehensive proposal for reforming the intercarrier compensation rules. Unfortunately, the Plan perpetuates the same regulatory distinctions that the Commission had previously deemed were not tied to economic or technical differences. Furthermore, the Plan creates additional investment

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87 *FNPRM* at ¶ 31.

88 *FNPRM* at ¶ 1.

89 *FNPRM* at ¶ 31.

uncertainty and, thus, impedes the capital infusion necessary for facilities-based competitors to develop an infrastructure that the Commission has determined would be pro-competitive and consistent with the de-regulatory environment envisioned by the 1996 Act.

Additionally, the Plan delays for four additional years the difficult regulatory decisions that the financial and equity markets demand the Commission make today. As a result, necessary resources will not be available to develop a competitive marketplace that spurs innovation and cost reductions to the benefit of the American consumer.

A. The Plan is Overly Complex

In its FNPRM, the Commission requested the submission of plans that reduced the complexity of the current intercarrier compensation regime. In contrast to a future mechanism, the Commission concluded that the current scheme depended on three factors: the type of traffic, the type of carrier involved, and the end points of the communication.[90] The Commission concluded that "[t]he record in [its intercarrier compensation] proceeding makes clear that a regulatory scheme based on these distinctions is increasingly unworkable in the current environment and creates distortions in the marketplace at the expense of healthy competition."[91] The Commission then stated as its initial goal for future intercarrier compensation regimes that "any new approach should promote economic efficiency."[92] Despite the Commission's criticism of the current approach and stated goal of a future regime, the Plan's suggested intercarrier compensation mechanism ignores both.

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[90] *FNRPM* at ¶ 3.

[91] *Id.*

[92] *FNRPM* at ¶ 31.

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In fact, it is hard to imagine a more complex mechanism. Every faulty and inefficient classification specifically identified by the Commission in both its initial NPRM in 2001 and its FNPRM in 2005 is repeated by the Plan. The Commission could summarily dismiss the Plan from further consideration on that basis alone.

No better example of the Plan's utter failure to satisfy the Commission's goals exists then language from the Plan itself. For example, the Plan states that: "*Intrastate access* charges will be reduced in *four* steps to the level of *interstate access* charges, but the resulting unified access charges will nonetheless remain distinct from *reciprocal compensation* rates *unless* the latter exceed *interstate access* charges (in which case *reciprocal compensation* charges will be reduced *in some circumstances* to match the unified *terminating access* rate)."[93] These rate determining criteria are made in the context of distinguishing what rates apply for one of three different carrier classifications.[94] Thus, the Plan unabashedly retains rate distinctions between the types of traffic, the types of carriers, and a call's end points – all of which the Commission had previously identified as inefficient and needing change.

Fifty additional, single spaced pages of rules just like that quoted above comprise the bulk of the ninety-page Plan.[95]

The complexity of the program also significantly impacts the implementation of the Plan.[96] Carriers would be required to track and modify their rates over a period of years. As

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93 *Plan* at §II.B., p. 8 (emphasis added).

94 Amazingly, the Plan continues in the next paragraph that "each of these Tracks is designed as an interim mechanism pending more comprehensive FCC review" – a review that will begin four years after the adoption of the Plan. This example demonstrates the uncertainty associated of the Plan, its complexity, and the length of time will elapse without substantive benefits to the industry.

95 *Plan* at p. 4-54.

96 *See Triennial Review Order*, 18 FCC Rcd. 17060, ¶ 121, n.418 (citing references that too much granularity could make the Commission's rules too complicated and could increase market uncertainty).

discussed in more detailed below, individual States can opt out of the Plan's requirements (subject to FCC preemption) that would, in turn, require carriers to maintain old classifications of traffic in some States and use different classifications for and between others. Rates for services remain segmented based on old classifications despite functional similarities. Negotiated interconnection agreements would create an additional layer of reporting.

While the complexity of implementing the Plan would impact negatively the day-to-day operations of a carrier, the Plan also would exacerbate the difficulty for independent auditors to review the finances of those carriers. Because current traffic classifications would not be eliminated and new ones would be added, the Plan layers a new regulatory scheme on top of the current one. Auditors currently struggle with the nuances of intercarrier compensation mechanisms. By adding another level of complexity, the Plan virtually guarantees that auditors will be required to make judgments based on wholly untested categorizations.

B. Voluntary Compliance of the Plan Impedes the Commission's Goals for Future Intercarrier Compensation Regimes

Apart from the its complexity, the Plan permits States to choose not to implement reforms for certain intrastate rates, subject to potential preemption by the FCC. The voluntary nature of the Plan, and the option, but not requirement, that the FCC may preempt the States, thereby increases its regulatory uncertainty. That uncertainty, in turn, shows that its purported consumer benefits are illusory.

States may choose not to adopt portions of the Plan as they see fit. For example, the reform provisions for intrastate *originating* access rates are voluntary for States during the Plan's initial phase for all carriers.[97] For more rural carriers, intrastate *terminating* access rate reform is also voluntary.[98] A carrier could, therefore, be forced to maintain multiple intercarrier compensation schemes for the same State without any prospect of unification (absent FCC preemption). This potential patchwork of intrastate rate structures between various States under the Plan seems hardly the efficient reform sought by the Commission.

While the Plan purports to create incentives for the various States to opt into the Plan, there are no guarantees they will do so as States retain the authority to determine whether to opt in.[99] In those circumstances, carriers would have to adhere to both a new mechanism on the interstate traffic and another mechanism for the intrastate traffic.

Although carriers may petition the FCC for preemption of State authority to force intrastate implementation of the Plan for the two largest categories of carriers[100] beginning in year two, preemption is not guaranteed and the process could take years before all legal challenges are resolved. The Plan further recommends that for the more rural carriers, the FCC should consider, during the rulemaking conducted in the fourth year of the Plan's implementation, whether to require States to implement all Plan rates.[101]

The voluntary and uncertain nature of State compliance is an anathema to the Commission's goal of a unified scheme for intercarrier compensation. Adopting such a plan would frustrate both carriers and auditors alike.

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97 *Plan* at §I.B.1.-2., p.3.

98 *Plan* at §I.B.2.b., p.3.

99 *Plan* at §I.B.-C., p.3.

100 *Plan* at §I.B.2.a., p.3.

101 *Plan* at §I.B.2.b., p.3.

C. The Plan Delays Decisions, Which Adds to Market Uncertainty

The Plan further frustrates the Commission's goals by leaving as open questions the adequacy of the proposed rates and their rate structures. Acknowledging that its purported compensation reform mechanism is "designed as an interim mechanism pending more comprehensive FCC review,"[102] the Plan intentionally inserts delay into the Commission's rulemaking process that, in turn, prevents the certainty needed by the industry to spur investment and development.

The delay incorporated into the Plan is substantial. For example, the Commission is asked to wait until the fourth year of the Plan's implementation before opening a proceeding to review the result's of the Plan's implementation. That review also must examine:

1. The effects on the industry and the public interest of the intercarrier reform implemented under the Plan;
2. The extent to which adjustments to the compensation structures and rate levels articulated by the Plan are necessary;
3. Whether the uniform target rates should be reduced, increased, or kept the same;
4. Whether carriers should move to a capacity-based structure;
5. Whether remaining originating switched access and transport and termination charges should be replaced with a system based more fully on end-user recovery.[103]

Additionally, during its sixth year, the Plan calls for the Commission to initiate another rulemaking to determine if the Plan's mechanism designed to replace switched carrier-to-carrier revenues lost by carriers subject to the Plan and not otherwise compensated for that loss through end-user charges should be harmonized with the traditional universal service fund or whether additional amounts should be made available.[104] Therefore, at least six years will pass before the

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102 *Plan* at §II.B., p.8.

103 *Plan* at §I.A.5.a.i.-v., pp. 2-3.

104 *Plan* at §I.A.6., p.3.

Commission will address whether the rates proposed by the Plan are reasonable. It seems unreasonable to ask the industry to wait so long when the Commission requested that the basis for any rate be included in the proposed future intercarrier compensation schemes.

D. The Panoply of Uncertainty Resulting from the Plan Will Block Competitive Investment

That uncertainty is the bane of the financial and equity markets is axiomatic. The Plan does nothing to reduce that uncertainty and, in fact, increases the uncertainty for at least six more years.

One of the Commission's goals is to reduce uncertainty to promote the investment of capital to facilitate the deployment of facilities. "Indeed, one of the Commission's most important policies is to promote facilities-based competition in the marketplace."[105] Facilities-based competition is considered important to create a competitive marketplace. By introducing regulatory and economic uncertainty by instituting inefficient rules and knowingly avoiding important compensation issues, the Plan is a recipe for instilling additional uncertainty in the markets. This uncertainty will inure to the benefit of incumbent LECs since competitive LECs will be hobbled in efforts to secure capital because of the variability of revenue streams. As a result, a facilities-based competitive marketplace would wither on the vine as true competitive alternatives are kept from accessing necessary capital for infrastructure investment.

Even Chairman Martin has opined on the effect that uncertainty has on the marketplace: "Protracted uncertainty can prolong financial difficulties. Regulatory uncertainty and delay can function as entry barriers in and of themselves, limiting investment and impeding deployment of

105 *FNPRM* at ¶31.

new services."[106] The Plan hardly seems the vehicle for the Commission to bring the telecom industry closer to its goal of greater facilities-based competition.

The Commission must address the key questions now. While criticism may be levied against the Commission for "picking" winners and losers in the industry, in the long run, businesses and the investment community are better served with decisive and reasoned conclusions. Further delay will only perpetuate the continued inefficiencies of the current intercarrier compensation regime.

VII. THE PROPOSED RATES ARE NEITHER UNIFIED NOR COST-BASED AND WOULD NOT ENCOURAGE INVESTMENT

The Plan's proposed rates ignore the fundamental precepts outlined by the Commission and recognized by other reform proponents as vital to the success of any future intercarrier compensation regime. By advocating the adoption of disparate rates unsupported by actual costs, the Plan fails to provide "similar rates for similar functions"[107] utilizing "similar cost recovery mechanisms."[108] The lack of compliance with these core principles requires that the Commission reject the Plan.

A. The Plan Fails to Unify or Significantly Simplify Rates

The Commission stated that the existing rules governing access charges and reciprocal compensation "apply different cost methodologies to similar services based on traditional regulatory distinctions that may have no bearing on the cost of providing service and many of

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106 *Triennial Review Order*, Separate Statement of Commissioner Kevin J. Martin, 18 FCC Rcd. 17542 (incorporating by reference, Remarks by Commissioner Kevin J. Martin, 20th Annual PLI/FCBA Telecom Conference, Dec. 12, 2002).

107 *FNPRM* at ¶ 33.

108 *Id.*

which are increasingly difficult to maintain."[109] The Commission further stated that the artificial distinctions between the types of traffic "distort the telecommunications markets at the expense of healthy competition."[110] Accordingly, the Commission required for future intercarrier compensation regimes that "[s]imilar types of traffic should be subject to similar rules" and that "[s]imilar types of functions should be subject to similar cost recovery mechanisms."[111] Additionally, NARUC recognized that a unified rate was another fundamental principle necessary to reform intercarrier compensation.[112] The Missoula Plan fails to satisfy these basic precepts.

Even a cursory examination of the Plan demonstrates that the proposed rates are not uniform for the functionality provided. First, the Plan rate is not unified across tracks, but varies depending on in which track (Track 1, 2 or 3) a particular carrier is classified. Second, the rate is not unified within tracks, but varies depending on whether a particular Track 2 carrier is under a price cap or rate of return regime[113] and depending on a particular Track 3 carrier's interstate access rate.[114] Third, the Plan introduces different rates for 8YY traffic that currently enjoys unified rates. Lastly, the rate is not unified for a single company, but varies depending on whether (1) the company is providing originating or terminating access services, (2) the state has adopted the unified rate (or been preempted and forced to do so), and (3) within the first two years, whether the company is serving ISP customers. Ultimately, the Plan proposes very little

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[109] *FNPRM* at ¶ 5.

[110] *FNPRM* at ¶ 15

[111] *FNPRM* at ¶ 33.

[112] *FNPRM* at ¶¶ 57-58.

[113] *Plan* at §II(B)(2)(a)(i)(1)-(2), p. 13.

[114] *Plan* at §II(B)(3), p. 17-19.

positive change to the patchwork of rates and regulations surrounding the current intercarrier compensation regime.

B. The $0.0005 Rate for Some Traffic Is Below Cost

The "unified" Missoula Plan rate of $0.0005 for terminating access traffic and non-access traffic is below cost and lacks any justification. As such, the Plan fails to provide "similar rates for similar functions"[115] utilizing "similar cost recovery mechanisms"[116] and should therefore be rejected.

In the course of implementing the 1996 Act, the State public utilities commissions opened proceedings to set the unbundled network element rates for the functionality related to intercarrier compensation. As of March 2006, only the State of Illinois had a combined tandem switching, and average common transport rate below $0.0007, and that rate excludes end-office switching costs.[117] The average total rate for all jurisdictions was $0.00318499, over six times higher than the Plan's proposed amount. Despite the extensive time and effort expended by the State commissions, the Plan ignores the data generated in those proceedings and sets a rate unencumbered by actual cost support. While selecting a "rate" in such a fashion may be expedient, doing so runs afoul of the Commission's requirement that the rate reflect the cost of the functions provided. Furthermore, as discussed in Section X.D., negotiated rates are an insufficient basis for adoption as a default rule by the Commission.

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115 *FNPRM* at ¶ 33.

116 *FNPRM* at ¶ 33.

117 A Survey of Unbundled Network Element Prices in the United States, West Virginia PUC's Consumer Advocate Division (Mar. 2006) (http:/www.cad.state.wv.us/March06UneSurvey.htm).

C. Interstate Dedicated Access Rate for Interconnection is Above Cost

As explained in Sections IV.C and X., the rate for interconnection facilities must comply with the Commission's TELRIC pricing standard under Section 252(d). The Plan ignores this requirement and instead requires competitors to pay above-cost dedicated access rates for interconnection facilities.

As the Supreme Court noted in its review of the FCC TELRIC pricing decision, "[u]nder the local competition provisions of the Act, Congress called for ratemaking different from any historical practice, to achieve the entirely new objective of uprooting the monopolies that traditional rate-base methods had perpetuated."[118] This reflected the admonition in Section 252 that a "rate-of-return or other rate based" methodology *not be used* to determine prices,[119] since rate-of-return proceedings are based upon use of historical costs.[120]

The Court noted that the Act was designed to promote "competition in the persistently monopolistic local markets, which were thought to be the root of natural monopoly in the telecommunications industry," and sought to "eliminate the monopolies enjoyed by the inheritors of AT&T's local franchises."[121] The Court noted that:

> For the first time, Congress passed a ratesetting statute with the aim not just to balance interests between sellers and buyers, but to reorganize markets by rendering regulated utilities' monopolies vulnerable to interlopers, even if that meant swallowing the traditional federal reluctance to intrude into local telephone markets.[122]

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118 *Verizon v. FCC*, 535 U.S. 467, 488 (2002).

119 47 U.S.C. § 252(d)(1)(A)(i) (emphasis added).

120 *See Illinois Bell Telephone Company v. FCC*, 988 F.2d 1254, 1258-59 (D.C. Cir. 1993)("*Illinois Bell*").

121 *Verizon*, 535 U.S. at 476.

122 *Id.* at 489.

The Court noted that from the "constancy of dissatisfaction" with prior rate-making approaches:

> one possible lesson was drawn by Congress in the 1996 Act, which was that regulation using the traditional rate-based methodologies gave monopolies too great an advantage and that the answer lay in moving away from the assumption common to all the rate-based methods, that the monopolistic structure within the discrete markets would endure.[123]

In fact, the fault with past historical cost rate making approaches was that they were often "no match for the capacity of utilities having all the relevant information to manipulate the rate base and renegotiate the rate of return every time a rate was set."[124] While the RBOCs were migrated to price cap regulation, this did not eliminate the gamesmanship as "there are still battles to be fought over the productivity offset and allowable exogenous costs."[125]

The Court observed that the 1996 Act appears to be an "explicit disavowal of the familiar public-utility model of rate regulation (whether in its fair-value or cost-of-service incarnations) presumably still being applied by many States for retail sales . . . ***in favor of novel ratesetting designed to give aspiring competitors every possible incentive to enter local retail telephone markets***, short of confiscating the incumbents' property."[126] Such a ratemaking approach was necessary given the tremendous advantages that the RBOCs possessed.

TELRIC, since it treated cost as a "forward-looking economic cost," met the requirements of the Act because it was distinct from "historically based cost" which had generally been relied upon in valuing a rate base.[127] The Court, in rejecting the RBOCs'

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[123] *Id*. at 487.

[124] *Id*. at 486.

[125] *Id*. at 487.

[126] *Id*. at 489.

[127] *Id*. at 495.

argument that the Act's definition of cost must be based on their historical, actual costs, astutely noted that "a merchant who is asked about the 'cost of providing the goods' he sells may reasonably quote the current wholesale market price, not the cost of the particular items he happens to have on his shelves."[128] The Court observed that ratemakers often rejected the utilities' "embedded costs" (their own book value estimates) "which typically were geared to maximize the rate bases with high statements of past expenditures and working capital, combined with unduly low rates of depreciation."[129] Thus, the Court concluded it would be "passing strange to think Congress tied 'cost' to historical cost without a more specific indication. . . . "[130]

The Court went as far as to note that there even is an argument that the Act explicitly forbids embedded-cost methodologies, and that even though the Commission refrained from this interpretation, "it seems safe to say that the statutory language places a heavy presumption against any method resembling the traditional embedded-cost-of-service model of ratesetting."[131] This is the presumption that Commission must overcome in promoting a methodology based on the ILECs' actual costs.

The Plan would have the Commission return to the very type of ratemaking Congress proscribed in the 1996 Act. Any methodology rooted in an incumbent's existing network deployment and technology is tethered to historical costs. The carrier's current expenses and actual costs, however, are their historical costs. Thus, the Plan promotes reverting to a historical

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128 *Id*. at 498.

129 *Id*. at 499.

130 *Id*. at 500.

131 *Id*. at 512.

cost approach despite the Act's admonition. The Court noted that Congress in proscribing traditional rate-of-return approaches was "firing a warning shot to state commissions to steer clear of entrenched practices perceived to perpetuate incumbent monopolies."[132] Both this Commission, and state commissions, rightfully employed a pricing methodology designed to uproot, not perpetuate, monopolies. In considering adoption of any intercarrier compensation regime, the Commission must ensure that the goal of uprooting monopolies is furthered, not diminished.

D. Non-cost Based Rates Discourage Investment

Because financial markets base decisions on, among other things, a company's return on investment, below-cost compensation rates and over-cost service rates will harm investment in facilities-based competitors. The Plan does not request the adoption of cost-based rates for intercarrier compensation. Instead, the Plan's rates are proposed without any cost support. If the Commission endorsed the Plan and approved its rates, the reaction by the financial markets would be predictably negative.

The Commission has been aware of the value of cost-based rates for years. In the *Local Competition Order*, for example, the Commission stated that cost-based pricing "create[d] the right investment incentives for competitive facilities-based entry"[133] and would "best ensure [] efficient investment decisions."[134] In contrast, the Commission noted that "investment decisions would be distorted if [] price[s] … were based on embedded costs."[135]

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[132] *Id*. at 512.

[133] *Local Competition Order* at ¶ 635.

[134] *Id*. at ¶ 705.

[135] *Id*. at ¶ 620.

The Plan does not propose cost-based prices for intercarrier compensation. The Plan's non-cost-based rates would discourage the very investment that the Commission desires a future intercarrier compensation regime to foster. The Commission should therefore not adopt the Plan.

VIII. THE PLAN DOES NOT ELIMINATE EXISTING ARBITRAGE OPPORTUNITIES AND CREATES NEW ONES

One of the guiding principles the FCC announced when embarking on this effort to reform intercarrier compensation was to "limit both the need for regulatory intervention and arbitrage concerns arising from regulatory distinctions unrelated to cost differences."[136] The Plan fails to meet this goal.

First, as explained above, the Plan does not establish a unified rate. In short, under the Plan, a minute is not a minute. The Plan's disparate rates mean that arbitrage opportunities would continue, and new arbitrage opportunities will emerge. For example, within a single extended area service area ("ESA") that includes numerous ILECs classified in different tracks, termination rates will vary. Thus, the Plan rates would cause a Track 3 LEC to lower its subscriber rates or provide other inducements to convince businesses to purchase local service from the Track 3 LEC rather than the Track 1 or 2 LEC. Similarly, if a Track 3 LEC has an affiliate that is a Track 1 CLEC, it would be advantageous for the CLEC to refer its business to its ILEC affiliate to take advantage of the higher termination rates.

Second, originating and terminating traffic is treated differently under the Plan. Another potential arbitrage opportunity involves higher originating access rates and the out-of-balance transport penalty. Because the originating access rate remains much higher than terminating

[136] *FNPRM* at ¶33.

access, the Plan would induce companies to seek out, and provide preferential local-only pricing to, customers that generate large volumes of outgoing calls. This would permit the serving carrier to collect higher originating access rates and avoid transport responsibilities by requiring the terminating carrier to pick up all traffic at the originating carrier's Edge. In short, together these two rules make ISP customers less attractive but make very attractive those customers with large volumes of outbound calling (such as telemarketers).

Third, the Plan creates special, one-off rules that provide new arbitrage opportunities. For example, under the Plan, a 1-800 provider could contract with LECs across the country to map its 1-800 numbers to local numbers in each of the major local calling areas where it expects to receive 1-800 calls. Under the Plan, these 1-800 calls, if routed to a number that is local to the originating caller, would be treated as non-access minutes.[137] Through this rule, a 1-800 provider could avoid paying the higher originating access rate and in fact generate terminating compensation for its LEC partners.

Another example is the discriminatory classification of VoIP-originated calls. The Plan specifies that VoIP traffic, but not traffic generated by ILEC enterprise customers, must be classified based on the NPA-NXX of the originating caller, rather than the billed telephone number.[138] Under this provision, an ILEC's large corporate customer with offices in multiple locations will avoid access charges for a call from a Detroit office to a California customer (routed through their California office). In contrast, a VoIP call routed through a VoIP provider's Detroit and California points of presence in the same manner would be subject to

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[137] *Plan* at §II.D.2.a.i.2)a), p. 26.

[138] *Plan* at §II.D.3.i.1), p. 28.

access charges. Because CLECs serve the vast majority of VoIP providers, this arbitrage opportunity under the Plan also discriminates against the CLEC's business customers.

In addition to the aforementioned examples, one of the primary problems with the Plan is that because it attempts to address so many issues, each individual issue lacks the detail and clarity necessary to implement the Plan's rule changes without further litigation. Thus, changing the rules in and of itself brings the potential for additional arbitrage opportunities. Because the Plan fails to eliminate arbitrage opportunities, it fails to meet the FCC's goals for intercarrier compensation reform and should be rejected.

IX. THE CLARK/MAKAREWICZ STUDY IS SPECIOUS

The Clark/Markarewicz Study ("CM") contends that the Plan would have positive economic benefits based on the assumption that the Plan's reduction in access charges would flow through to consumers, allowing the incremental price of wireline long-distance minutes to decline by 1.443 cents per minute over the Plan's four-year phase-in.[139] It estimates that this price reduction would result in an increase in wireline long-distance usage from 582 billion minutes per year to 744 billion minutes per year, an increase of 27.8 percent over four years. CM further postulates that given the value of the consumer surplus generated by this increase in usage along with the net of the SLC increases and Restructure Mechanism ("RM") charges, consumers would be better off by over $1 billion per year by the fourth year of the Plan, with benefits growing in future years. CM claims that adoption of the Plan would produce sizable

[139] Richard N. Clarke and Thomas J. Makarewicz, "Economic Benefits from Missoula Plan – Reform of Intercarrier Compensation," AT&T Inc. (Exhibit 2 to *The Missoula Plan for Intercarrier Compensation Reform* dated July 18, 2006).

gains in aggregate economic welfare, concluding that "the economy-wide benefits of these various reforms may reach $54 billion during the eight year period after plan initiation."

However, none of these claimed benefits are credible because CM's estimate suffers from a number of flawed assumptions. First, the "revenue neutrality" aspect of the Plan is misleading. In order for the Plan to achieve the required revenue-neutrality, nonresidential customers and customer groups not specifically identified in the Missoula documentation would necessarily pay more. Moreover, if CM's projected wireline toll demand stimulation is accurate (and instead of the Plan being revenue-neutral), ILECs would reap an enormous windfall revenues due to revenues that have been excluded from the net revenue neutrality calculation.

Realistically, reductions in long distance toll charges would not even occur. The Plan does not require that carriers flow-through any of the access charge reductions in retail prices charged to end-user customers, and flow-through would only occur if marketplace forces compelled that to happen. In fact, recent events (such as certain ILECs' failure to flow-through the reduction in USF contribution fees attributable to the reclassification of DSL Internet revenues) demonstrate that it is much more likely that ILECs would *retain as additional profit* the access charge reductions rather than passing them on to their retail customers. Consequently and absent such flow-throughs, consumers would be paying higher monthly line rates without seeing any of the offsetting decreases in usage-based charges.

The CM analysis is also driven by a series of other unsupported and unrealistic assumptions, all of which serve to inflate and exaggerate the likely benefits of the Plan. It unrealistically assumes that: (1) 100% of access charge reductions would flow through to consumers in the form of lower retail prices available to end-user consumers; (2) 100% of the intrastate access charge reductions prescribed by the Plan are adopted by state commissions and are fully flowed through in end-user retail prices; (3) the price elasticity of demand for long distance toll service is -0.72; (4) the price elasticity of demand for wireless service is -1.29; (5) cross-price elasticities among alternate telecom technologies are zero and can be ignored; and (6) all wireline and wireless long distance minutes are priced and sold on a per-minute-of-use basis.[140]

The National Regulatory Research Institute ("NRRI"), raises similar concerns. In its August 11, 2006 briefing paper, NRRI noted, among other things, that the 100% flow-though is optimistic, increase in wireline toll usage is contrary to current trends, all wireline consumers do not benefit - only those with high usage do, residential wireline attrition to wireless and VOIP was not considered, wireless contracts and calling plans were overlooked, specific benefits to business and residential consumers were not revealed, and revenue neutrality is unrealistic.

Accordingly, the Clark/Makarewicz study provides no basis for adoption of the Plan.

X. THE PLAN IS UNLAWFUL IN SEVERAL RESPECTS

A. The Proposed Termination Rate Is Unlawful

Section 252(d)(2) provides that reciprocal compensation rates are just and reasonable only if "(i) such terms and conditions provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier; and (ii) such terms and conditions determine such costs on the basis of a reasonable approximation of the additional costs of terminating such calls."[141] In its 1996 *Local Competition Order*, the Commission

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[140] *Id*. at p. 9.

[141] 47 U.S.C. § 252(d)(2).

interpreted the "additional cost" standard for reciprocal compensation at section 252(d)(2) to be the same as the TELRIC standard it developed for unbundled network elements.[142] The Commission also rejected the idea that reciprocal compensation rates should be limited to incremental costs: "A rate equal to incremental costs may not compensate carriers fully for transporting and terminating traffic when common costs are present. We therefore reject the argument by some commenters that 'additional costs' may not include a reasonable allocation of forward-looking common costs."[143]

Significantly, the Commission has not identified TELRIC rates as a concern in connection with intercarrier compensation.[144] Any principled intercarrier compensation reform plan should provide that the TELRIC rate for reciprocal compensation must reflect the ILEC's rate to terminate a call, and it must also reflect the most efficient technology available. An ILEC should be indifferent as to whether it incurs the cost itself or pays another carrier to incur the cost. If reciprocal compensation rates overcompensate a carrier (meaning that the terminating carrier's costs are below the set compensation rate), then the ILEC has improperly set the rate.

In the *Local Competition Order,* the Commission determined that "the 'additional cost' to the LEC of terminating a call that originates on a competing carrier's network primarily consists of the traffic-sensitive component of local switching."[145] A substantial body of decisions establish a benchmark for determining whether a particular reciprocal compensation rate is a "reasonable approximation" of the "additional costs of terminating such calls." As the

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142 *Local Competition Order* at ¶ 1054.

143 *Local Competition Order* at ¶ 1058.

144 *FNPRM* at ¶ 66.

145 *Local Competition Order* at ¶ 1057.

Commission has already recognized, the network functionality for which reciprocal compensation is owed is the same as the network functionality required to be provided as an unbundled network element.[146]

Even though switching is no longer required as a section 251 unbundled network element, every state commission has either set an unbundled switching rate through the arbitration process, or has approved interconnection agreements that include rates for unbundled switching. Those rates reflect the forward-looking cost of a carrier to provide terminating switching.

As set forth in Attachment 1 to these comments, a survey of state-set TELRIC rates shows that the average of all state UNE rates for functions comparable to transport and termination is approximately $0.003. But, a reciprocal compensation rate would be "a reasonable approximation" of a carrier's costs to terminate a call only if it is reasonably comparable to the carrier's TELRIC cost for the switching unbundled network element.

Therefore, the Plan's rate cap of $0.0005 is substantially, by several orders of magnitude, below the rates set by states that comply with the applicable statutory standard for prices for transport and termination. Accordingly, the proposed cap of $0.0005 for transport and termination is unlawful.

It is also worth noting that any unified intercarrier compensation regime should and must bring together the disparate intercarrier compensation structures developed under section 201, section 251(g), section 251(b)(5), and applicable state law. Because any unified intercarrier compensation regime must encompass the reciprocal compensation requirements of section

[146] *Local Competition Order* at ¶ 1054.

251(b)(5), the rate-setting basis for a unified intercarrier compensation regime must be consistent with the pricing standard for reciprocal compensation found at section 252(d)(2) of the 1996 Act. This is both appropriate and lawful because section 252(d)(2) rates are cost-based, include a reasonable profit, and, as forward-looking costs, are consistent with competition. Thus, the pricing standard under section 252(d)(2) can and should provide a foundation for harmonizing current different rates set under different sections of the Act. For the purposes of developing a <u>unified</u> intercarrier compensation regime, the Commission is restricted by sections 251(b)(5) and 252(d)(2) of the 1996 Act.

B. Transport for Network Interconnection Must Be Cost-Based

The Plan is also unlawful because it would not set prices at TELRIC for transport facilities between a CLEC switch and an ILEC switch, which are interconnection facilities under section 251(c)(2). In the *Triennial Review Order*, the Commission distinguished transport facilities that would qualify as UNEs from transport facilities provided as interconnection facilities. The Commission explained that "transmission facilities connecting incumbent LEC networks to competitive LEC networks for the purpose of backhauling traffic" were "[u]nlike the facilities that incumbent LECs explicitly must make available for section 251(c)(2) interconnection."[147] Section 251(c)(2) interconnection facilities must be provided under the same pricing principles as UNEs. Section 251(c)(2)(D) requires interconnection facilities to be provided "on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, in accordance with . . . the requirements of this section and Section 252." This is identical to the pricing standard for UNEs found at section 251(c)(3), which must be provided "on rates, terms,

[147] *Triennial Review Order* at ¶ 365.

and conditions that are just, reasonable, and nondiscriminatory in accordance with . . . the requirements of this section and Section 252." Interconnection trunks between an ILEC wire center and a CLEC wire center are interconnection facilities under section 251(c)(2) that must be provided at TELRIC.[148] Because the Plan contemplates that ILECs could provide interconnection facilities at interstate access rates that have not been shown to comply with TELRIC, it violates Section 252(d)(1).

C. Tandem Transit Services Are Essential and Must Be Provided by ILECs at TELRIC Rates

As explained in Section IV.C., the proposed TTS provisions are not competitively neutral because they would permit ILECs to exploit their market power by refusing to provide TTS or charging unreasonable prices. But even if this were not the case, the TTS provisions of the Plan are flatly unlawful.

First, ILECs have an obligation under both section 251(a) and 251(c)(2) to provide tandem transit service to any requesting telecommunications carrier. As the U.S. Court of Appeals for the Sixth Circuit and numerous state commissions have found, nothing in Section 251(c)(2) limits an ILEC's interconnection duty to the exchange of traffic between the ILEC and the requesting carrier.[149] Section 251(c)(2) requires an ILEC to provide interconnection with its network "for the transmission and routing of telephone exchange service and exchange access." This requirement is not limited only to the routing of traffic originated by either the ILEC or the

[148] *Southwestern Bell Telephone, L.P., d/b/a SBC Missouri v The Missouri Public Service Commission, et al (No. 4:05-CV-1264 CAS),* ___ F. Supp. 2d ___, (E.D. Mo.) Sept. 14, 2006. (finding that SBC was required to allow access to entrance facilities used for interconnection at the same cost-based TELRIC rates applicable to UNEs.)

[149] *Mich Bell Tel. Co. v Chappelle*, 222 F. Supp. 2d 905, 917 (D. Mich 2002) (*aff 'd, Mich. Bell Tel. Co. v Chappelle*, 93 Fed. Appx. 799 (6th Cir. 2004)); *see also* Attachment 2.

requesting carrier. The statute is written broadly enough to include traffic originated by a third party or terminated to a third party. In order for a competitive carrier to transmit and route telephone exchange service to a third-party carrier, at the request of the competitive carrier, an ILEC has an obligation under 251(c)(2) to provide tandem transit service.

Further, section 251(a) imposes a general duty on all telecommunications carriers "to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers." The obligation to provide transit gives meaning to the requirement of indirect interconnection in Section 251(a)(1) of the Act. In short, ILECs are required under Sections 251 and 252 of the Act to provide transit at cost-based rates. Because the Plan removes transit from federal and state regulation and makes TTS subject to commercial agreements, it violates the Act.

Numerous state commissions already have ruled that ILECs have an obligation to provide tandem transit service. The North Carolina Utilities Commission ordered Verizon to provide tandem transit service, and questioned why Verizon was even challenging its obligation. In one of the best statements of the issue to date and the policy favoring a transit requirement, the NCUC said:

> If there were no obligation to provide transit service, the ubiquity of the telecommunications network would be impaired. . . The fact of the matter is that transit traffic is not a new thing. It has been around since "ancient" times in telecommunications terms. The reason that it has assumed new prominence since the enactment of [the 1996 Act] is that there are now many more carriers involved—notably, the CMRS providers and the [CLECs]—and the amount of traffic has increased significantly. Few, if any, thought about complaining about transit traffic until recently. It strains credulity to believe that Congress, in [the 1996 Act] intended, in effect, to impair this ancient practice and make it merely a matter of grace on the part of ILECs, when doing so would inevitably have a tendency to

> thwart the very purposes that [the 1996 Act] was designed to allow and encourage.[150]

As shown in Attachment 2, in addition to the NCUC, State commissions in Arkansas, California, Connecticut, Illinois, Indiana, Kansas, Kentucky, Massachusetts, Michigan, Missouri, and Tennessee have also found that an ILEC is obligated to provide transit service under federal and/or state law.

Second, the TTS provisions of the Plan are unlawful because ILECs are required to provide TTS at TELRIC. Because ILECs have an obligation under section 251(c)(2) of the Act to provide tandem transit service, the proper pricing standard for tandem transit service is TELRIC under section 252(d)(2).[151] Because the Plan proposes rates that exceed TELRIC, it violates Section 252(d)(2).

D. The Commission May Not Adopt the Proposed Rates Based on A Theory That Rates Were Negotiated

The Plan proposes that the Commission adopt as default rules various intercarrier compensation rates that are essentially negotiated rates that have no basis in cost.[152] Even if it

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150 *Petition of Verizon South, Inc., for Declaratory Ruling that Verizon is Not Required to Transit InterLATA EAS Traffic between Third Party Carriers and Request for Order Requiring Carolina Telephone and Telegraph Company to Adopt Alternative Transport Method*, Docket No. P-19, Sub 454, Order Denying Petition (NCUC Sep. 22, 2003) at 6-7; *see also Joint Petition of NewSouth Communications Corp. et al. for Arbitration with BellSouth Telecommunications, Inc.*, Docket Nos. P-772 Sub 8, P-916 Sub 5, P-989 Sub 3, P-824 Sub 6, P-1202 Sub 4, Recommended Arbitration Order (N.C. PUC July 26, 2005) at 126-132 (upheld by *Joint Petition of NewSouth Communications Corp. et al. for Arbitration with BellSouth Telecommunications, Inc.*, Docket Nos. P-772 Sub 8, P-916 Sub 5, P-989 Sub 3, P-824 Sub 6, P-1202 Sub 4, Order Ruling on Objections and Requiring the Filing of the Composite Agreement (N.C. PUC Feb. 8, 2006)).

151 *See Joint Petition of NewSouth Communications Corp. et al. for Arbitration with BellSouth Telecommunications, Inc.*, Docket Nos. P-772, P-916, P-989, P-824, P-1202, Recommended Arbitration Order (N.C. PUC July 26, 2005) at 130-132 (stating that, "the tandem transit function is a Section 251 obligation, and BellSouth must charge TELRIC rates for it") (upheld by *Joint Petition of NewSouth Communications Corp. et al. for Arbitration with BellSouth Telecommunications, Inc.*, Docket Nos. P-772 Sub 8, P-916 Sub 5, P-989 Sub 3, P-824 Sub 6, P-1202 Sub 4, Order Ruling on Objections and Requiring the Filing of the Composite Agreement (N.C. PUC Feb. 8, 2006)).

152 *Plan* at Policy and Legal Overview, p. 7.

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might be possible for the Commission to establish default intercarrier compensation rates on the basis of negotiation among industry participants, rather than the cost standard set forth in the 1996 Act, the Commission has not established any such system or invoked the Negotiated Rulemaking Act in this instance. The Commission has not established any rules, standards or procedures, either of general applicability or for application in this case, that could provide a basis for setting intercarrier compensation rates or adopting rule changes based on industry negotiations. For example, the Commission has not adopted any procedures generally, nor did it propose to establish any, to assure that all interested parties participated in such negotiations seeking to develop the so-called industry consensus termination rate proposed in the Plan. As is evident from the list of Plan proponents, only a limited group of parties, primarily ILECs, participated in formulating the Plan. Continued opposition to the Plan by nearly every sector of the communications industry, including wireless, CLEC, cable, ILEC, and consumer groups, shows that not all interested parties were at the table to negotiate the Plan. Accordingly, the Commission may not adopt the Plan, and in particular its proposed prescribed rate caps, or find that they are reasonable and lawful merely because various industry groups have negotiated them.

E. Forbearance from Enforcement of Sections 252(c) and 252(d)(2) Is Not Authorized

The Plan contemplates possible forbearance from sections 252(c) and 252(d)(2) insofar as necessary to permit the Commission to impose rate caps for Track 1 and Track 2 carriers.[153] However, the Plan provides little more than an allusion to the possibility of forbearance, with no

[153] *Plan* at Policy and Legal Overview, Attachment A, p. 7-8.

serious attempt to make the requisite showing under Section 10 of the Act that could justify forbearance. More important, the Plan violates forbearance standards. For all the reasons stated in these comments, the Plan would discriminate against CLECs and their customers, and would harm consumers by imposing the large and unnecessary costs of protecting ILECs from competition and preserving and enhancing their revenues. Commenters reserve the right to respond to any serious forbearance showing that ILECs may make in this proceeding at a later time.

XI. CONCLUSION

As shown herein, the Plan does not meet the principles established by the FCC or NARUC for intercarrier compensation reform. It does not preserve state authority over intrastate rates; does not promote economic efficiency; is not competitively or technologically neutral; does not create regulatory certainty, limit the need for regulatory intervention, or eliminate arbitrage based on regulatory distinctions; does not preserve universal service; and does not encourage the efficient use of, and investment in telecommunications networks and the development of efficient competition.

Second, it is not an industry consensus plan. To the contrary, it is bad for consumers and competitors, and provides unwarranted advantages to incumbents. Third, it does not unify rates but continues disparate rates for the same function depending on the carrier involved (rural, non-rural, rate-of-return, price cap). Moreover, the "negotiated" rates it proposes are below cost (when the competitor is the recipient) and above cost (when the incumbent is the primary recipient). Fourth, the Plan is overly complex and goes well beyond intercarrier compensation; materially modifying universal service, interconnection, traffic billing and collection, and rate deregulation. The Plan omits key details necessary to implementation and guarantees continued uncertainty and litigation. For these reasons, the Commission should reject the Plan.

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STATE	LOCAL SWITCHING RATE	TANDEM SWITCHING RATE	10-MILE COMMON TRANSPORT	TOTAL STATE RATE	TOTAL TRANSIT RATE
Alabama	$0.0007025	$0.0001000	$0.0003224	$0.00112490	$0.0004224
Alaska	$0.0065950	$0.0047120	$0.0002300	$0.01153700	$0.0049420
Arizona	$0.0009695	$0.0005500	$0.0008236	$0.00234310	$0.0013736
Arkansas	$0.0025300	$0.0007890	$0.0001960	$0.00351500	$0.0009850
California	included in port rate	$0.0004530	$0.0012490	$0.00170200	$0.0017020
Colorado	$0.0016100	$0.0006900	$0.0011100	$0.00341000	$0.0018000
Connecticut	included in switching rate	$0.0061100	no data provided	$0.00611000	$0.0061100
District of Columbia	$0.0030000	$0.0025320	$0.0000500	$0.00558200	$0.0025820
Delaware	$0.0025070	$0.0006688	$0.0000200	$0.00319580	$0.0006888
Florida	$0.0007662	$0.0001319	$0.0004372	$0.00133530	$0.0005691
Georgia	$0.0006153	$0.0000972	$0.0001914	$0.00090390	$0.0002886
Hawaii	$0.0076074	$0.0012572	$0.0002710	$0.00913560	$0.0015282
Idaho	$0.0013430	$0.0006900	$0.0011100	$0.00314300	$0.0018000
Illinois	included in port rate	$0.0002150	$0.0003040	$0.00051900	$0.0005190
Indiana	included in port rate	$0.0002950	$0.0005130	$0.00080800	$0.0008080
Iowa	$0.0015580	$0.0006900	$0.0011100	$0.00335800	$0.0018000
Kansas	$0.0025300	$0.0007980	$0.0001960	$0.00352400	$0.0009940
Kentucky	$0.0011970	$0.0001940	$0.0007466	$0.00213760	$0.0009406
Louisiana	$0.0018680	$0.0001067	$0.0003748	$0.00234950	$0.0004815
Maine	$0.0016800	$0.0019400	no data provided	$0.00362000	$0.0019400
Maryland	$0.0013250	$0.0002480	$0.0013410	$0.00291400	$0.0015890
Massachusetts	$0.0008250	$0.0000430	$0.0002680	$0.00113600	$0.0003110
Michigan	included in port rate	$0.0001980	$0.0008300	$0.00102800	$0.0010280
Minnesota	included in port rate	$0.0011200	$0.0006130	$0.00173300	$0.0017330
Mississippi	$0.0010269	$0.0001723	$0.0004541	$0.00165330	$0.0006264
Missouri	$0.0028070	$0.0012310	$0.0002460	$0.00428400	$0.0014770
Montana	$0.0015740	$0.0006900	$0.0011100	$0.00337400	$0.0018000
Nebraska	$0.0012600	$0.0006900	$0.0011100	$0.00306000	$0.0018000
Nevada	$0.0016100	$0.0017100	$0.0072700	$0.01059000	$0.0089800
New Hampshire	$0.0031990	$0.0006840	$0.0005650	$0.00444800	$0.0012490
New Jersey	$0.0013990	$0.0007720	$0.0000060	$0.00217700	$0.0007780
New Mexico	$0.0025180	$0.0008530	$0.0012730	$0.00464400	$0.0021260
New York	$0.0011470	$0.0004810	$0.0002030	$0.00183100	$0.0006840
North Carolina	$0.0015000	$0.0006000	$0.0003400	$0.00244000	$0.0009400
North Dakota	$0.0014750	$0.0006900	$0.0011100	$0.00327500	$0.0018000
Ohio	$0.0007790	$0.0002130	$0.0006290	$0.00162100	$0.0008420
Oklahoma	$0.0038000	$0.0009560	$0.0004990	$0.00525500	$0.0014550
Oregon	$0.0013301	$0.0006900	$0.0010400	$0.00306010	$0.0017300
Pennsylvania	$0.0013730	$0.0001200	$0.0001000	$0.00159300	$0.0002200

Rhode Island	$0.0013580	$0.0002740	$0.0002910	$0.00192300	$0.0005650
South Carolina	$0.0010519	$0.0001634	$0.0004095	$0.00162480	$0.0005729
South Dakota	$0.0007020	$0.0001634	$0.0013879	$0.00225326	$0.0015513
Tennessee	$0.0008041	$0.0009778	$0.0003800	$0.00216190	$0.0013578
Texas	$0.0021160	$0.0007940	$0.0001440	$0.00305400	$0.0009380
Utah	$0.0017980	$0.0006940	$0.0010390	$0.00353100	$0.0017330
Vermont	$0.0040030	$0.0009210	$0.0006300	$0.00555400	$0.0015510
Virginia	$0.0026430	$0.0005480	$0.0001140	$0.00330500	$0.0006620
Washington	$0.0011780	$0.0006900	$0.0007600	$0.00262800	$0.0014500
West Virginia	$0.0025860	$0.0002394	$0.0006700	$0.00349540	$0.0009094
Wisconsin	included in port rate	$0.0002290	$0.0004850	$0.00071400	$0.0007140
Wyoming	$0.0009200	$0.0006900	$0.0011100	$0.00272000	$0.0018000
			50 State Average -	***$0.00318499***	***$0.0015147***
				AVG. TOTAL RATE	***AVG. TRANSIT RATE***

(1) The data from this table was derived from West Virginia PUCs Consumer Advocate Division's: A SURVEY OF UNBUNDLED NETWORK ELEMENT PRICES IN THE UNITED STATES (Updated March 2006). Table 1 - *Unbundled Network Element Rate Comparison Matrix*, accessed at http://www.cad.state.wv.us/March06UneSurvey.htm.

(2) In instances where the common transport rates were published per mile, a 10-mile baseline was used to calculate the common transport rate.

(3) The Switching, Tandem Switching and Common Transport Rates are listed per MOU

States that Have Ordered ILECs to Provide Transit Service Under Federal or State Law

Arkansas

The Arkansas Public Service Commission ("Arkansas PSC") has determined that Section 251(c)(2)(A) requires an ILEC, such as SBC, to provide "interconnection with the [ILEC's] network . . . for the transmission and routing of telephone exchange service and exchange access" regardless of the originating or terminating party of such traffic.[1] It found that under Section 251(c)(2), there is no exclusion for third party transit traffic that is telephone exchange service or exchange access traffic.[2] "Moreover, if incumbents such as SBC were not required to provide transit service, they could deprive competitors of the economies of scale and scope inherent in a ubiquitous network, a network largely paid for by captive ratepayers. The incumbent could substantially raise rivals' costs by forcing them to choose between paying supra-competitive prices for the service or constructing direct trunking connections with other carriers that cannot be economically justified by the anticipated volumes of traffic. Because transit service is required to be provided pursuant to Section 251(c)(2), there is no question that the applicable terms are arbitrable under Section 252."[3]

California

In California, ILECs are required to provide tandem transiting services subject to Section 251 and 252 regulation.[4] Interconnection agreements in California have been arbitrated to include language requiring CLECs to use "commercially reasonable efforts" to establish direct interconnection when

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[1] *Telcove Investment, LLC's Petition for Arbitration Pursuant to Section 252(B) of the Communications Act of 1934, As Amended by the Telecommunications Act of 1996, and Applicable State Laws for Rates, Terms, and Conditions of Interconnection with Southwestern Bell Telephone, L.P. d/b/a SBC Arkansas*, Docket No. 04-167-U, Memorandum and Order (Ark. PSC, Sept. 15, 2005) at 58-59.

[2] *Id*.

[3] *Id*.

[4] *Petition of Level 3 Communications, LLC (U-5941-C) for Arbitration Pursuant to Section 252(b) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996, and Applicable State Laws for Rates, Terms and Conditions for Interconnection with SBC Bell Telephone Company dba SBC California and SBC Communications, A.04-06-004*, Final Arbitrator's Report (Ca. PUC Feb. 8, 2005) at 41-46 ("*Level 3 California Report*"); *Verizon California Inc. (U-1002-C) Petition for Arbitration of an Interconnection Agreement with Pac-West Telecomm, Inc. (U-5266-C) Pursuant to Section 252(b) of the Telecommunications Act of 1996, A. 02-06-024*, Final Arbitrators Report (Ca. PUC Feb. 10, 2003) at 17-18 ("*Verizon California Report*").

transit traffic to a third party carrier reaches a DS-1 or greater level for three consecutive months.[5] Additionally, to the extent that transit traffic is subject to Section 251(b)(5) reciprocal compensation, the rates must be TELRIC based.[6]

Connecticut

The Connecticut Department of Public Utility Control ("Connecticut DPUC") has determined that tandem transit services is an interconnection service and thus subject to its regulatory authority.[7] Thus, ILECs in Connecticut are required to offer transit traffic services to requesting CLECs. Such services need not be priced at TELRIC; rather, the rates can be based on a cost study so long as the study complies with Connecticut DPUC's directives regarding TSLRIC principles.[8] However, the Connecticut DPUC has reduced an ILECs mark-up of such services, finding that the rate was unreasonable and inconsistent with the provisions of Section 252 of the Act which requires that the rates be reasonable.[9]

Illinois

The Illinois Commerce Commission ("ICC") interpreted the *Virginia Arbitration Order*[10] as imposing transiting duties on ILECs, finding that Section 251(a)(1) imposes a duty to connect indirectly.[11]

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[5] *Level 3 California Report* at 44.

[6] *Id*. at 44-45.

[7] *Petition of Cox Connecticut Telecom, L.L.C. For Investigation of The Southern New England Telephone Company's Transit Service Cost Study Rates*, Docket No. 02-01-23, Decision (Conn. DPUC Jan. 15, 2003) at 50.

[8] *Id*. at 36-37.

[9] *Id*. at 41.

[10] *Petition of AT&T Communications of Virginia Inc., Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia Corporation Commission Regarding Interconnection*, 17 FCC Rcd 27039 (2002) ("*Virginia Arbitration Order*").

[11] *Level 3 Communications, LLC, Petition for Arbitration Pursuant to Section 252(b) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996, and the Applicable State Laws for Rates, Terms, and Conditions of Interconnection with Illinois Bell Telephone Company (SBC Illinois)*, Docket No. 04-0428, Proposed Arbitration Decision, (Ill. PUC Dec. 23, 2004) at 72 (docket was closed before a Final Decision was released, *see Level 3 Communications, LLC, Petition for Arbitration Pursuant to Section 252(b) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996, and the Applicable State Laws for Rates, Terms, and Conditions of Interconnection with Illinois Bell Telephone Company (SBC Illinois)*, Docket No. 04-0428, Notice to Commission, David Gilbert, Administrative Law Judge (July 22, 2005)).

According to the ICC, in that subsection, Congress was likely first assuring universal interconnectivity and also prohibiting obstruction of that interconnectivity.[12] The ICC has stated that "to promote competition and efficiency, the terms and conditions governing transiting should be addressed in the parties' ICA with the other terms governing interconnection, unless the parties agree otherwise. The ICA should also assure … that the ILEC is properly compensated for transiting …, and that there are safeguards against perpetual transiting when sufficient basis arises for installing direct CLEC-to-CLEC interconnection….Such measures will maintain an appropriate balance, so that the systemic benefits of transiting are not diluted."[13] According to the ICC, "[a]n ILEC is ubiquitous within its service territory, while a CLEC will not necessarily have sufficient resources to directly interconnect with every other CLEC in that territory, at least until its traffic to each such CLEC reaches the critical mass that justifies capital investment. Furthermore, neither competition nor customer welfare would be promoted by deploying assets to directly interconnect CLECs that exchange trivial traffic quantities."[14]

<u>Indiana</u>

In reviewing Level 3's Petition for Arbitration with Indiana Bell Telephone Company d/b/a SBC Indiana in 2004, the Indiana Utility Regulatory Commission ("Indiana Commission") determined that "Section 251(a) imposes on all telecommunications carriers the duty to interconnect with the facilities and equipment of other telecommunications carriers either 'directly or indirectly.'"[15] The Indiana Commission further held that SBC has an obligation to interconnect with telecommunications providers "for the termination and routing of telephone exchange service and exchange access" under Section 251(c)(2) and that this section requires that the parties exchange ***all*** traffic regardless of origination or termination.[16]

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[12] *Id*.

[13] *Id*. at 74.

[14] *Id*.

[15] *Level 3 Communications, LLC's Petition for Arbitration Pursuant to Section 252(B) of the Communications Act of 1934, As Amended By The Telecommunications Act of 1996, and the Applicable State Laws For Rates, Terms, And Conditions Of Interconnection With Indiana Bell Telephone Company d/b/a SBC Indiana*, Cause No. 42663 INT-01, (Ind. URC Dec. 22, 2004) at 12.

[16] *Id*.

Kansas

The Kansas Corporations Commission ("KCC") has affirmed arbitration decisions requiring ILECs to provide transiting service.[17] The KCC stated that, "there is no language addressing transit traffic [in the 1996 Act], thus the Commission is not bypassing any federal act provision" when requiring an ILEC to continue to provide transit service pursuant to an interconnection agreement.[18] Additionally, the KCC has rejected an ILECs proposal for a separate transit agreement with market-based prices because there is no evidence of a transit market and a market-based price could not be established.[19]

[17] *Petition of CLEC Coalition for Arbitration against Southwestern Bell Telephone, L.P. d/b/a SBC Kansas under Section 252(b)(1) of the Telecommunications Act of 1996; In the Matter of the Application of AT&T Communications of the Southwest, Inc. and TCG Kansas City Inc. for Compulsory Arbitration of Unresolved Issues with SBC Kansas Pursuant to Section 252(b) of the Telecommunications Act of 1996; Request of the CLEC Joint Petitioners for Arbitration with Southwestern Bell Telephone, L.P. d/b/a SBC Kansas for an Interconnection Agreement that Complies with Sections 251 and 271 of the Federal Telecommunications Act; Petition of Navigator Telecommunications, LLC. for Arbitration against Southwestern Bell Telephone, L.P. d/b/a SBC Kansas Pursuant to Section 252(b)(1) of the Telecommunications Act of 1996*, Docket No. 05-BTKT-365-ARB; Docket No. 05-AT&T-366-ARB; Docket No. 05-TPCT-369-ARB; Docket No. 05-NVTT-370-ARB, Opinion: Order No. 16: Commission Order on Phase II Intercarrier Compensation, Subloop and 911 Issues (Kan Corp. Commission, July 18, 2005); *see also Arbitration between Telcove Investment, LLC and SouthwesternBell Telephone Company d/b/a SBC Kansas Pursuant to Section 252(b) of the Communications Act of 1934, as Amended by the Telecommunications Act of 1996, and Applicable State Laws for Rates, Terms, and Conditions of Interconnection*, Docket No. 05-ABIT-507-ARB, Opinion: Order 8 Arbitrators' Award, (Kan. Corporation Commission, June 8, 2005).

[18] *Id.*

[19] *Petition of CLEC Coalition for Arbitration against Southwestern Bell Telephone, L.P. d/b/a SBC Kansas under Section 252(b)(1) of the Telecommunications Act of 1996; Application of AT&T Communications of the Southwest, Inc. and TCG Kansas City Inc. for Compulsory Arbitration of Unresolved Issues with SBC Kansas Pursuant to Section 252(b) of the Telecommunications Act of 1996; Request of the CLEC Joint Petitioners for Arbitration with Southwestern Bell Telephone, L.P. d/b/a SBC Kansas for an Interconnection Agreement that Complies with Sections 251 and 271 of the Federal Telecommunications Act; Petition of Navigator Telecommunications, LLC. for Arbitration against Southwestern Bell Telephone, L.P. d/b/a SBC Kansas Pursuant to Section 252(b)(1) of the Telecommunications Act of 1996*, Docket No. 05-BTKT-365-ARB; Docket No. 05-AT&T-366-ARB; Docket No. 05-TPCT-369-ARB; Docket No. 05-NVTT-370-ARB, Opinion: Order No. 16: Commission Order on Phase II Intercarrier Compensation, Subloop and 911 Issues (Kan Corp. Commission, June 6, 2005);

Kentucky

The Kentucky Public Service Commission ("KPSC") has required ILECs to transit traffic pursuant to a CLEC's request.[20] Additionally, the KPSC has found that based on its previous determinations regarding third-party transiting, and because transiting uses intra-state facilities to provide an intra-state service, the Commission has jurisdiction over the matters until and unless the FCC specifically preempts its authority.[21] Accordingly, the KPSC has required an ILEC to provide transit services at TELRIC-based rates unless an additional TIC can be justified.[22]

Massachusetts

The Massachusetts Department of Transportation and Energy ("DTE") has determined that Section 251(c)(2) of the Act requires ILECs to provide tandem transiting services.[23]

Michigan

In *Michigan Bell Telephone v Chappelle*, the federal district court held that because "federal law does not preclude mandatory transiting, under the [Federal Act's] savings clause [Section 261(c)], the [Michigan Public Service Commission] is allowed to impose additional pro-competitive requirements

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[20] *Joint Petition for Arbitration of NewSouth Communications Corp., NUVOX Communications, Inc., KMC Telecom V, Inc., KMC Telecom III LLC, and Xspedius Management Co. Switched Services, LLC, Xspedius Management Co. of Lexington, LLC, and Xpedius Management Co. of Louisville, LLC of an Interconnection Agreement with BellSouth Telecommunications, Inc. Pursuant to Section 252(B) of the Communications Act of 1934, As Amended*, Case No. 2004-00044 (Ky. PSC, March 14, 2006).

[21] *Id*. at Issue 65.

[22] *Id*.

[23] *Petitions of MediaOne Telecommunications of Massachusetts, Inc. and New England Telephone and Telegraph Company d/b/a Bell Atlantic-Massachusetts for arbitration, pursuant to Section 252(b) of the Telecommunications Act of 1996 to establish an interconnection agreement, and Petition of Greater Media Telephone, Inc. for arbitration, pursuant to Section 252(b) of the Telecommunications Act of 1996 to establish an interconnection agreement with New England Telephone and Telegraph Company d/b/a Bell Atlantic-Massachusetts*, D.T.E. 99-42/43, D.T.E. 99-52, (Mass. D.T.E. Aug. 25, 1999) at 73 ("*Media One Order*"); *Petition of Greater Media Telephone, Inc. for arbitration, pursuant to Section 252(b) of the Telecommunications Act of 1996 to establish an interconnection agreement, with New England Telephone and Telegraph Company d/b/a Bell Atlantic-Massachusetts,* D.T.E. 99-52, (Mass. D.T.E. Sept. 24, 1999) at Section F (4) ("*Greater Media Order*").

under state law."[24] The Michigan Public Service Commission ("Michigan PSC") has imposed the requirement that ILECs provide tandem transit services to CLECs pursuant to Sections 251 and 252.[25]

Missouri

The Missouri Public Service Commission ("Missouri PSC") has determined that transit traffic is an interconnection service pursuant to Section 252.[26] Thus, the Missouri PSC will not approve any interconnection agreements when the parties have also entered into a transit traffic agreement not before it.[27]

North Carolina

The North Carolina Utilities Commission ("NCUC") determined that under the 1996 Act, ILECs are obligated to provide tandem transit service.[28] According to NCUC, the transiting obligation follows

[24] *Mich Bell Tel. Co. v Chappelle*, 222 F. Supp. 2d 905, 917 (D. Mich 2002) (*aff 'd, Mich. Bell Tel. Co. v Chappelle*, 93 Fed. Appx. 799 (6th Cir. 2004)).

[25] *Petition of Level 3 Communications, LLC, for arbitration pursuant to Section 252(b) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996, and the applicable state laws for rates, terms, and conditions of an interconnection agreement with Michigan Bell Telephone Company, d/b/a SBC Michigan*, Case No. U-14152, Decision of the Arbitration Panel (Mich. PSC Dec. 10, 2004) (after the arbitration panel decision was issued, parties negotiated interconnection agreement which was approved by Commission, *see Petition of Level 3 Communications, LLC, for arbitration pursuant to Section 252(b) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996, and the applicable state laws for rates, terms, and conditions of an interconnection agreement with Michigan Bell Telephone Company, d/b/a SBC Michigan*, Case No. U-14152, Order Granting Joint Application (Mich. PSC Feb. 24, 2005) ("*Level 3 Michigan Petition*"); *Petition of Michigan Bell Telephone Company d/b/a SBC Michigan for arbitration of interconnection rates, terms, conditions, and related arrangements with MCIMetro Access Transmission Services, LLC, pursuant to Section 252b of the Telecommunications Act*, Case No. U-13758, Opinion and Order, (Mich. PSC Aug. 18, 2003) ("*Michigan Bell Petition*"); *Petition of AT&T Communications of Michigan, Inc., for arbitration to establish an Interconnection Agreement with Ameritech Michigan (Case No. U-1151), Petition of Ameritech Michigan for arbitration to establish an Interconnection Agreement with AT&T Communications of Michigan, Inc. (Case No. U-1152*), Order Approving Agreement Adopted by Arbitration (Mich. PSC Nov. 26, 1996) p. 14 ("*Petition of Ameritech*").

[26] *Application of Chariton Valley Communications Corporation, Inc., for Approval of an Interconnection Agreement with Southwestern Bell Telephone, L.P. d/b/a SBC Missouri pursuant to Section 252(e) of the Telecommunications Act of 1996*, Case No. TK-2005-0300, Order Rejecting Interconnection Agreement (Mo. PSC, May 29, 2005).

[27] *Id*.

[28] *Petition of Verizon South, Inc., for Declaratory Ruling that Verizon is Not Required to Transit InterLATA EAS Traffic between Third Party Carriers and Request for Order Requiring Carolina Telephone and*

(Footnote Continued on Next Page.)

directly from the obligation to interconnect and the right of non-incumbent carriers to elect indirect connection pursuant to Section 251(a)(1) and Section 252(c)(2). The right to transit services exists independently of any given interconnection agreement between the parties, although such agreements may establish procedures for it. In 2005, the NCUC reaffirmed its position that tandem transit function is a Section 251 obligation and further clarified that ILECs must charge TELRIC rates for it.[29]

Tennessee

The TRA has found that Section 251(c)(2) requires, not just permits, BellSouth to make available to new entrants its network for the purpose of allowing new entrants to exchange traffic with other CLECs without having to interconnect with each and every CLEC.[30]

(Footnote Continued from Previous Page.)

Telegraph Company to Adopt Alternative Transport Method, Docket No. P-19, Sub 454, Order Denying Petition (NCUC Sep. 22, 2003) at 6-7.

[29] *See Joint Petition of NewSouth Communications Corp. et al. for Arbitration with BellSouth Telecommunications, Inc.*, Docket Nos. P-772 Sub 8, P-916 Sub 5, P-989 Sub 3, P-824 Sub 6, P-1202 Sub 4, Recommended Arbitration Order (N.C. PUC July 26, 2005) at 126-132 (upheld by *Joint Petition of NewSouth Communications Corp. et al. for Arbitration with BellSouth Telecommunications, Inc.,* Docket Nos. P-772 Sub 8, P-916 Sub 5, P-989 Sub 3, P-824 Sub 6, P-1202 Sub 4, Order Ruling on Objections and Requiring the Filing of the Composite Agreement (N.C. PUC Feb. 8, 2006)).

[30] *Petition for Arbitration of the Interconnection Agreement Between BellSouth Telecommunications, Inc. and Intermedia Communications Inc. Pursuant to Section 252(b) of the Telecommunications Act of 1996,* Docket No. 99-00948 (Tenn. Reg. Authority, July 11, 2000).